No. 06-6330
Title: Derrick Kimbrough, Petitioner
v.
United States
Docketed: September 7, 2006
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (05-4554)
Decision Date: May 9, 2006
Rehearing Denied: June 6, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 5 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 10, 2006)
Sep 13 2006	Waiver of right of respondent United States to respond filed.
Sep 21 2006	DISTRIBUTED for Conference of October 6, 2006.
Oct 5 2006	DISTRIBUTED for Conference of October 27, 2006.
Dec 14 2006	DISTRIBUTED for Conference of January 5, 2007.
Jan 4 2007	Response Requested . (Due February 5, 2007)
Jan 31 2007	Memorandum of respondent United States filed.
Feb 7 2007	Reply of petitioner Derrick Kimbrough filed.
Feb 15 2007	DISTRIBUTED for Conference of March 2, 2007.
Mar 8 2007	Letter of March 6, 2007, from counsel for petitioner received.
Jun 4 2007	DISTRIBUTED for Conference of June 7, 2007.
Jun 11 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 10 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jul 10 2007	Motion to file Volume II of the joint appendix under seal filed by petitioner Derrick Kimbrough.
Jul 24 2007	Joint appendix filed. (Volume I)
Jul 26 2007	Brief amici curiae of Sentencing Project, and the Center for the Study of Race and Law at the University of Virginia School of Law
Jul 26 2007	Brief of petitioner Derrick Kimbrough filed.
Jul 26 2007	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed.
Jul 26 2007	Brief amicus curiae of National Association of Crimihnal Defense Lawyers filed. VIDED.
Jul 26 2007	Brief amicus curiae of American Civil Liberties Union filed.
Jul 26 2007	Brief amici curiae of Federal Public and Community Defenders, et al. filed.
Jul 31 2007	Statement of cost for printing the joint appendix received pursuant to Rule 26.
Aug 8 2007	Record received from U.S.C.A. for Fourth Circuit. (1 envelope)
Aug 10 2007	Record received from U.S.D.C. for the Eastern District of Virginia. (Norfolk) (1 envelope)
Aug 14 2007	SET FOR ARGUMENT Tuesday, October 2, 2007.
Aug 16 2007	CIRCULATED.

Aug 20 2007 Motion to file Volume II of the joint appendix under seal GRANTED.
Aug 30 2007 Brief of respondent United States filed. (Distributed)
Sep 25 2007 Reply brief on the merits of petitioner Derrick Kimbrough filed.

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No. (8)

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK KIMBROUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines are to be applied as advisory only, and as one of a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a) in exercising its discretion in selecting a sentence and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's holdings, the following questions are presented.

(1) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant, may a district court consider either the impact of the so-called "100:1 crack /powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

(2) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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No. ___-_____

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK KIMBROUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. In the alternative, he requests that the petition be held pending the Court's decision regarding certiorari in *Eura v. United States*, No. 05-11659 (petition for certiorari filed June 20, 2006).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, which is unpublished, appears at pages 1a to 3a of the appendix to the petition. *See also United States v. Kimbrough*, 174 Fed. Appx. 798 (4th Cir. May 9, 2006) (No. 05-4554). The transcript of the sentencing hearing in the district court appears at pages 5a to 31a of the appendix to the petition and is unpublished.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over the United States's appeal of Petitioner's sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on May 9, 2006. Petitioner sought rehearing in the court of appeals, which the court denied on June 6, 2006. A copy of the order is included at page 4a of the appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The text of § 3553(a) of Title 18 of the United States Code is reproduced at pages 32a to 33a of the appendix to this petition.

STATEMENT OF THE CASE

A. Proceedings in the District Court

A grand jury sitting in the Eastern District of Virginia charged Petitioner and a co-defendant with conspiring to possess with intent to distribute crack cocaine and powder cocaine, as well as with possession with intent to distribute both crack and powder cocaine, in violation of 21 U.S.C. § 846 and § 841(a). C.A.J.A. 7-10.[1] The two men were also charged with possession of a firearm in connection with the drug offenses, in violation of 18 U.S.C. § 924(c). C.A.J.A. 11. The charges arose out of their arrests by Norfolk city police officers. *See* C.A.J.A. 83-84.

Petitioner pled to the charges as indicted, without benefit of a plea agreement, on January 11, 2005. C.A.J.A. 4-5, 82. By turning down the government's offer to dismiss the § 924(c) count,

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[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals. "Pet. App." refers to the appendix attached to this petition.

C.A.J.A. 17, 39, Petitioner subjected himself to an additional mandatory minimum term of imprisonment of 60 months (five years) on the firearms charge, to run consecutively to the mandatory minimums of 120 months (ten years) on two of the three drug charges. *See* 18 U.S.C. § 924(c)(1)(A)(i), (D)(ii); 21 U.S.C. § 841(b)(1)(A)(iii). The court scheduled the sentencing hearing for April 11, 2005. C.A.J.A. 5.

In determining Petitioner's advisory guideline range, the probation officer set the base offense level pursuant to U.S.S.G. § 2D1.1 at 32, based on 92.1 grams of cocaine powder and 56 grams of crack cocaine. C.A.J.A. 84, 85. The probation officer added a two-level enhancement for obstruction of justice, U.S.S.G. § 3C1.1, and further denied Petitioner a reduction for acceptance of responsibility, U.S.S.G. § 3E1.1, to both of which Petitioner objected. C.A.J.A. 86; *see* C.A.J.A. 16-17. In regard to Petitioner's criminal history, the probation officer assessed a total of three points, which resulted in a criminal history category of II. C.A.J.A. 103-04. The offense level of 34, when combined with the criminal history category, yielded a guideline range of 168-210 months. C.A.J.A. 77; *see* U.S.S.G. Ch. 5, Pt. A.

In addition to the guideline calculation objections, counsel for Petitioner argued in his sentencing position paper that the district court should impose a sentence below the range recommended by the Sentencing Guidelines. As support for this argument, counsel cited the various factors that the court was required by 18 U.S.C. § 3553 to consider in arriving at an appropriate sentence, and urged the court to consider the disparity in sentences created by the so-called "100:1 crack/powder ratio" to ensure that the sentence would "reflect the seriousness of the offense, promote respect for the law and provide a just punishment for the offense." C.A.J.A. 18. Petitioner

went on to request a sentence consisting of the 180 months of imprisonment required by statute for the offenses of conviction. C.A.J.A. 20-21.[2]

At the sentencing hearing, the district court overruled both of Petitioner's objections to the presentence report. Pet. App. 12a-14a, 19a, C.A.J.A. 36-38, 43. Having done so, the court then proceeded to make specific findings that "the criminal history category of the defendant in this case is II and the offense level is 34," and that "the guideline range with respect to these counts indicate[s] that the guideline sentencing range is 168 to 210, plus 60 months consecutive." Pet. App. 20a, C.A.J.A. 44. Thus, the total range, reflecting the consecutive 60 months, was 228 to 270 months, or 19 to 22-1/2 years.

When asked by the court if the government had any argument in regard to the length of the sentence it should impose, the assistant U.S. Attorney asked "that the Court adopt the recommendation of the guidelines in this case" because "[t]he guidelines themselves, I mean, they take in many factors, including many of the factors in section 3553, which the Court also has to consider without question . . . ." Pet. App. 21a, C.A.J.A. 45. The assistant concluded, "I think that would be a reasonable sentence in this case so that I would ask the Court to sentence him somewhere within the guideline range, and of course, plus the 60 months for the 924(c)." *Id.* When asked by the court if the government thought that "[a]nywhere from 19 and 22 years" was "an appropriate sentence," the assistant answered, "I think it's a reasonable sentence, Your Honor." *Id.* As with its written response, the government did not address the crack/powder ratio issue.

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[2] In its written response, the government addressed only the issues regarding the enhancement for obstruction and the denial of the reduction for acceptance of responsibility. The government failed to address Petitioner's argument regarding the 100:1 crack/powder ratio. C.A.J.A. 22-27. The government had no objections of its own to the presentence report. C.A.J.A. 98.

On behalf of Petitioner, counsel again urged the court to impose a sentence no higher than the applicable mandatory minimum sentences, for a total sentence of 180 months. Pet. App. 24a, C.A.J.A. 48. Focusing on the crack/powder ratio, counsel reminded the court that Petitioner "had actually more powder cocaine than he had crack cocaine in his possession." Pet. App. 22a, C.A.J.A. 46.[3] Further, counsel reiterated the findings of the U.S. Sentencing Commission that "the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity most impacts minorities . . . ."[4] *Id.* Counsel explained how the Sentencing Commission's findings went toward the various factors that the court was required by 18 U.S.C. § 3553 to consider in arriving at a sentence, and in particular the needs to avoid unwarranted disparity, to promote respect for the law, and to impose a just punishment. Pet. App. 22a-23a, C.A.J.A. 46-47. Finally, counsel also offered for the court's consideration Petitioner's relatively minor criminal history (and in particular, the fact that he had not had a felony conviction until this case), his work history, the fact that the case resulted from a state, not federal, drug interdiction, and the fact that Petitioner voluntarily submitted himself to a minimum 180-month sentence by pleading guilty as charged. Pet. App. 23a-24a,

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[3] In fact, the amount of powder cocaine was almost twice that of the amount of crack cocaine, 92.1 grams of powder as compared to 56 grams of crack. C.A.J.A. 85.

[4] *See generally* U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm; *see also* U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), *available at* http://www.ussc.gov/crack/exec.htm; U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF.

C.A.J.A. 47-48. The government did not respond to any of defense counsel's points. *See* Pet. App. 24a, C.A.J.A. 48.

Before imposing sentence upon Petitioner, the district court explained how it arrived at its decision. First, the court reviewed the considerations that it was required to take into account in determining the sentence:

> The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective way.

Pet. App. 24a-25a, C.A.J.A. 48-49. The court also recognized that it was "required to consider factors other than what the sentencing guidelines recommend because the sentencing guidelines constitute only one factor. The sentencing guidelines as calculated exclude[] consideration of a number of factors that [§] 3553(a) tells the Court that the Court should consider" – things such as the history and characteristics of the defendant, his educational and vocational skills, his family ties and background, and his military record[5] – "[y]et the sentencing factors other than the guidelines say[] the Court should consider those."[6] Pet. App. 26a, C.A.J.A. 50.

The court also stated the ultimate legal standard that it was required to apply in determining a sentence, that "[o]ne thing the statute tells the Court to do [is that] in fashioning a sentence, the Court is not to impose a sentence that is greater than necessary to accomplish the factors I have just

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[5] *See* U.S.S.G. §§ 5H1.2, 5H1.5, 5H1.6, 5H1.11.

[6] *See* 18 U.S.C. § 3553(a)(1) (a sentencing court "shall consider . . . the history and characteristics of the defendant"); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

outlined." Pet. App. 25a, C.A.J.A. 49. The court then expressed its view "that to impose a sentence of 19 to 22 years in this case is ridiculous" because "[i]t imposes more punishment, given the record here, than is necessary to accomplish what needs to be done." *Id.* The court went on to explain why this was so.

First, the court recognized that while Petitioner and his co-defendant were caught with both powder cocaine and crack cocaine (the nature and circumstances of the offense), it was the latter that was "driving the offense level to a point higher than is necessary to do justice in this case." Pet. App. 25a, C.A.J.A. 49. The court specifically relied upon the fact that "the Sentencing Commission [has] recognize[d] that crack cocaine has not caused the damage that the Justice Department alleges it has . . . ." *Id.* The court also considered Petitioner's history and background, such as the fact that while Petitioner had a criminal record, "it's a record involving misdemeanors, and as counsel points out, until this case, he has not had a felony conviction." Pet. App. 25a-26a, C.A.J.A. 49-50. Further, the court considered "that this defendant at one time served in combat in Desert Storm and honored his country and received an honorable discharge, and that for [the] most part since he was honorably discharged, the defendant has been a construction worker and has found meaningful employment someplace." Pet. App. 27a, C.A.J.A. 51.

Finally, returning to the fact that the offense involved both crack and powder cocaine, the court noted "that the crack cocaine involved in this case does in fact exaggerate the advisory guideline" and that "should [the Court] follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case." *Id.* Accordingly, "[g]iven all of those factors and the Court's need to avoid imposing an unwarranted disproportionate sentence," the Court sentenced Petitioner to 120 months on each of the drug convictions and 60 months on the firearms conviction, for a total of 180

months, "which is clearly long enough under the circumstances." Pet. App. 27a-28a, C.A.J.A. 51-52.[7]

B. Proceedings in the Court of Appeals

The United States appealed the sentence imposed by the district court. Following the completion of briefing, the court of appeals scheduled the case for oral argument on December 2, 2005, the same day as argument in *United States v. Eura*, 4th Cir. No. 05-4533. Two and a half weeks before argument, however, the court removed Petitioner's case from the argument calender. *See United States v. Kimbrough*, 4th Cir. No. 05-4554, docket entries for Oct. 5 and Nov. 14, 2005; *see also United States v. Eura*, 4th Cir. No. 05-4533, docket entries for Oct. 5 and Dec. 2, 2005.

On February 24, 2006, the court of appeals issued its decision in the *Eura* case. *See United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659). In that decision, the court held that a district court cannot vary from the advisory sentencing range on the basis of the disparity created by the 100:1 crack/powder ratio or the U.S. Sentencing Commission's recommendations in regard to the ratio, and that a sentence based on that information would be deemed unreasonable. *See id.* at 632-34. Without any reference to the prefatory language of 18 U.S.C. § 3553(a), that a district court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing spelled out in the remainder of the sentencing statute, the court of appeals stated that, "in arriving at a reasonable sentencing, the [district] court simply must not rely on a fact that would result in sentencing disparity that totally is at odds with the will of Congress." 440 F.3d at 634. The appellate court further held

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[7] While the court indicated that it thought that the 180-month sentence was too long, the court also recognized that it was, of course, bound by the mandatory minimum sentences directed by Congress on three of the four counts. Pet. App. 28a, C.A.J.A. 52.

that "[t]he Sentencing Commission's recommendations to narrow the 100:1 ratio are such impermissible factors and, thus, cannot be used as a basis to vary from the advisory sentencing range." *Id.* Because the court of appeals was "of the opinion that the district court did not adequately and properly consider 18 U.S.C. § 3553(a)(6) in sentencing Eura," the court vacated the below-guidelines sentence. *Id.* at 632, 634. Judge Michael, while concurring in the judgment, effectively dissented as to the latter part of the majority's holding. In his view, the Sentencing Commission "reports can be used to support a below-guidelines sentence that takes into account the several case-specific factors in § 3553(a) and at the same time respect[] the single factor in § 3553(a)(6). *Id.* at 635.

The court of appeals issued its opinion in Petitioner's case on May 9, 2006. Pet. App. 1a; *United States v. Kimbrough*, 174 Fed. Appx. 798 (4th Cir. May 9, 2006) (No. 05-4554). In a brief unpublished per curiam ruling, the court stated, "According to our recen: decision in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), a sentence that is outside the guideline range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." Pet. App. 2a. The court accordingly determined that "[b]ecause the district court concluded that the crack to powder disparity warranted a sentence below the applicable guideline range, we are constrained to vacate Kimbrough's sentence and to remand the case for resentencing." Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

A. Introduction

In the last five years alone, over 25,000 defendants, representing 20% of those defendants sentenced federally for controlled substance offenses, have been sentenced for crack cocaine offenses.[8] The vast majority of those defendants, like Petitioner, are black men.[9] Sentences for crack cocaine offenses run, on average, 40 months longer than sentences for powder cocaine offenses. Viewed another way, crack cocaine sentence are more than 50% longer than powder cocaine sentences,[10] notwithstanding the general public's disagreement with the harshness of crack cocaine sentences.[11] The 100:1 crack/powder ratio results in the expenditure of millions of dollars every year

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[8] *See* U.S. Sentencing Commission, *2001 Sourcebook of Federal Sentencing Statistics* 68 (Table 33), *available at* http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm; U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics* 68 (Table 33), *available at* http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm; U.S. Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics* 78 (Table 33), *available at* http://www.ussc.gov/ANNRPT/2003/SBTOC03.htm; U.S. Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics* 94, 300 (Table 33 before and after *Blakely v. Washington*, 542 U.S. 296 (2004)), *available at* http://www.ussc.gov/ANNRPT/2004/SBTOC04.htm; U.S. Sentencing Commission, *2005 Sourcebook of Federal Sentencing Statistics* 96, 314 (Table 33 before and after *United States v. Booker*, 543 U.S. 220 (2005)), *available at* http://www.ussc.gov/ANNRPT/2005/SBTOC05.htm.

[9] *2001 Sourcebook* at 69, 70 (Tables 34, 35); *2002 Sourcebook* at 69, 70 (Tables 34, 35); *2003 Sourcebook* at 79, 80 (Tables 34, 35); *2004 Sourcebook* at 95, 96, 301, 302 (Tables 34, 35 before and after *Blakely*); *2005 Sourcebook* at 97, 98, 315, 316 (Tables 34, 35 before and after *Booker*).

[10] *2001 Sourcebook* at 81 (Figure J); *2002 Sourcebook* at 81 (Figure J); *2003 Sourcebook* at 91 (Figure J); *2004 Sourcebook* at 107, 313 (Figure J before and after *Blakely*); *2005 Sourcebook* at 109, 328 (Figure J before and after *Booker*).

[11] *See* Peter H. Rossi & Richard A. Berk, *Public Opinion on Sentencing Federal Crimes* 66-67 & Table 4.7 (in Chapter 4) (1995, released 1997), *available at* http://www.ussc.gov/nss/jp_exsum.htm. The survey found that while the Guideline mean sentence for trafficking in crack cocaine was nearly 22 years, respondents would give a mean sentence of only 14.2 years, the same that they would give for trafficking in powder cocaine. Similarly, while the Guideline median sentence for crack cocaine offenses was also 22 years, the median sentence imposed by the

(continued...)

in increased incarceration costs for the Federal Bureau of Prisons. More importantly, it results in thousands of additional years of lives spent in prison, and in incalculable, unquantifiable losses to the affected defendants and their families.

The sheer number of cases affected by the 100:1 crack/powder ratio alone warrants this Court's review of the questions presented as important matters that also involve important federal questions. *See* S. Ct. R. 10(a), (c). However, the Court should also grant certiorari for three additional reasons. First, the ruling of the court of appeals that lower courts cannot consider the impact of the 100:1 crack/powder ratio through the several reports of the U.S. Sentencing Commission contravenes Supreme Court precedent. *See* S. Ct. R. 10(c). Second, the court of appeals' treatment of those reports conflicts with the court of appeals' own precedent and with that of at least three other circuits. *See* S. Ct. R. 10(a). And third, the court of appeals' treatment of the factors in 18 U.S.C. § 3553(a) conflicts with that statute and with this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). S. Ct. R. 10(c). Further, how the district courts (and, consequently, the appellate courts) should treat the § 3553(a) factors is an important question of federal law because it affects upwards of 70,000 cases each year.

B. *Booker* and Its Impact on Federal Sentencing Procedure

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that a federal criminal defendant's Sixth Amendment rights are violated when his or her sentence is increased under the United States Sentencing Guidelines based on the district judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. *Id.* at 243-44. As a remedy for the constitutional infirmity presented when the Guidelines mandate a sentence increase

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[11] (...continued)
respondents was only 10 years, again the same as for powder cocaine offenses. *Id.*

based on judge-found facts, the Court severed 18 U.S.C. § 3553(b)(1) from the Sentencing Reform Act of 1984, thereby rendering the Guidelines "effectively advisory." *Id.* at 245.

Under *Booker*, a sentencing court must still "consider Guidelines ranges," but is now permitted "to tailor the sentence in light of other statutory concerns as well" under § 3553(a). *Id.* at 245-46; *see* 18 U.S.C. § 3553(a). In other words, the Sentencing Reform Act now requires district judges "to take account of the Guidelines together with other sentencing goals" set forth in § 3553(a). 543 U.S. at 245. Section 3553(a) in turn mandates that a district court "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) . . . ." Section 3553(a)(2) describes those purposes as the needs of the sentence imposed

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendants; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Moreover, courts are to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant, *see* § 3553(a)(1); (2) the kinds of sentences available, *see* § 3553(a)(3); (3) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* § 3553(a)(6); and (4) the need to provide restitution to victims, *see* § 3553(a)(7). "[W]ith the mandatory duty to apply the Guidelines excised, the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance." *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005).

In addition to excising § 3553(b)(1), the Court determined that it was also necessary to excise 18 U.S.C. § 3742(e), which had provided the standards of review for the federal courts of appeals to apply in considering sentencing appeals. The Court excised the latter provision because "it depend[ed] on the Guidelines' mandatory nature." *Booker*, 543 U.S. at 245.

Appellate courts thus continue to review sentencing determinations under *Booker* and § 3553(a), but apply a different standard than before. The federal courts of appeals now review sentencing decisions only for unreasonableness. More specifically, "appellate courts [are] to determine whether the sentence 'is unreasonable' with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261.

In short, in directing the lower courts in how to proceed under a sentencing scheme in which the Sentencing Guidelines are advisory, not mandatory, the Court made quite clear that the Guidelines are one of many factors to be considered. 543 U.S. at 261; *see id.* at 245-46. Moreover, the Court placed no limits on the kinds of information that a district court may consider in determining what sentence to impose.

C. The Court of Appeals Based Its Ruling on a Faulty Factual Premise That Contravenes Supreme Court Precedent

The first reason why the Court should grant certiorari is that the court of appeals relied upon an erroneous factual assumption that in turn contravenes Supreme Court precedent. Specifically, the court assumed that the 100:1 ratio as implemented in the Sentencing Guidelines was required by Congress. That is incorrect. All that Congress has specified is that sentences imposed pursuant to mandatory minimum *statutory* provisions utilize the 100:1 ratio. *See* Anti-Drug Abuse Act of 1986,

Pub. L. 99-570, 100 Stat. 3207 (1986). Congress simply has never affirmatively directed the Sentencing Commission to incorporate that ratio into the Sentencing Guidelines. Moreover, even in rejecting the Commission's attempt to change the ratio in 1995, Congress still did not direct the Commission that it must retain the ratio. Quite to the contrary, Congress told the Commission to study the matter further and try again. *See* Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

Thus, now that the Sentencing Guidelines are advisory, once a district court has correctly calculated the advisory guideline range (using the 100:1 ratio as incorporated in the Guidelines in the first instance) and taken that range into consideration, the only 100:1 ratio that the court must abide in the end by is the one embodied in the mandatory minimum statutes – which the district court in Petitioner's case in fact observed. Accordingly, because the position of the court of appeals rested upon a crucial but faulty factual assumption, a grant of certiorari is warranted.

A grant of certiorari by this Court is further warranted because the erroneous factual assumption by the court of appeals further led it to contravene the Supreme Court's opinion in *Koon v. United States*, 518 U.S. 81 (1996), by limiting the district court's discretion. In *Koon*, the Ninth Circuit had held as a matter of law that the district court could not consider certain bases for a downward departure. In rejecting the government's arguments in defense of the appellate court's ruling, the Supreme Court stated, "Those arguments, however persuasive as a matter of sentencing policy, should be directed to the [Sentencing] Commission. *Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance.*" *Id.* at 106 (emphasis added).

As explained above, however, Congress has mandated the use of the 100:1 ratio *only* for statutory mandatory minimum sentences; it has not mandated the ratio for the Guidelines. Moreover, the Sentencing Commission has, on multiple occasions, determined that the 100:1 ratio does not

comport with the requirements of 18 U.S.C. § 3553(a). Yet by ruling that a district court can *never* consider the propriety of the 100:1 ratio in determining what sentence to impose in a particular case, the court of appeals has exercised exactly the authority that the Supreme Court struck down in *Koon*. Accordingly, because the position of the lower court conflicts with Supreme Court precedent, this Court should grant certiorari.

D. The Court of Appeals' Treatment of the Several Reports of the U.S. Sentencing Commission That Criticize the 100:1 Crack/Powder Ratio Conflicts With the Court of Appeals' Own Precedent and With That of at Least Three Other Circuits

Similarly, this Court should grant certiorari to consider whether and in what manner a sentencing court may consider the 1995, 1997, and 2002 reports of the United States Sentencing Commission that study the validity and impact of the 100:1 crack/powder ratio and the recommendations made in the reports. The majority of the *Eura* court took the position that the reports can never be considered. *United States v. Eura*, 440 F.3d at 625, 634 (4th Cir. 2006) (stating that "[t]he Sentencing Commission's recommendations to narrow the 100:1 ratio are such impermissible factors [as they "would result in a sentencing disparity that is totally at odds with the will of Congress"], and, thus, cannot be used as a basis to vary from the advisory sentencing range"), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659). Judge Michael in his concurring opinion, however, noted that the Commission exhaustively researched the reports and based them upon substantial evidence and public comment. *Id.* at 635-36. Judge Michael took the position that the sentencing courts should be allowed to consider the Commission reports within the context of the specific facts of a particular defendant's case. *Id.* at 637.

The majority's absolute position conflicts with circuit precedent. Prior Fourth Circuit cases have always erred on the side of allowing sentencing judges to consider a wide array of information

in formulating a sentence. For example, in *United States v. Falesbork*, 5 F.3d 715, 722 (4th Cir. 1993), the court of appeals noted "the broad scope of information that 18 U.S.C. § 3661 permits a sentencing judge to consider."[12] Hearsay evidence is routinely and liberally allowed into evidence at sentencing hearings. *United States v. Love*, 134 F.3d 595, 607 (4th Cir.), *cert. denied*, 524 U.S. 932 (1998); *accord United States v. Bowman*, 926 F.2d 380, 381 (4th Cir. 1991); *see* U.S.S.G. § 6A1.3, comment (stating that any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy"). The entire "relevant conduct" foundation on which the Sentencing Guidelines are predicated follows the principle that judges should be given the maximum amount of information possible.

In the *Eura* decision, however, the majority opinion took the unusual step of limiting the information a district court can consider when sentencing a defendant. Further, it removed from consideration not just any information, but the thoroughly-researched and thoughtfully-considered reports of the Sentencing Commission.

In contrast, Judge Michael's more nuanced approach of allowing consideration of the reports in the context of a particular case upholds the prior practice of empowering sentencing judges with the maximum amount of knowledge and information possible. This approach is also consistent with the First Circuit's decision in *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), in which that court stated that by its decision, it did "not intend to diminish the discretion that, after *Booker*, district court courts enjoy in sentencing matters *or to suggest that, in a drug-trafficking case, the nature of*

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[12] Section 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

the contraband and/or the severity of a projected guideline sentence may not be taken into account on a case-by-case basis." *Id.* at 65 (emphasis added).

The *Eura* majority's position is also inconsistent – and Judge Michael's position consistent – with that of the Seventh Circuit in *United States v. Jointer*, ___ F.3d ___, 2006 WL 2266308 (7th Cir. Aug. 9, 2006), and with that of the Eleventh Circuit in *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006). In *Jointer*, the Seventh Circuit reiterated its earlier decision in *United States v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006), that district courts are required to implement the 100:1 ratio in calculating the correct sentencing guideline range. 2006 WL 2266308, at *3. However, "[t]o ensure that our holding is received in the proper context," the court "emphasize[d] that, once a correct guideline sentence has been calculated, the district court must fashion an individual sentence for the defendant before it by evaluating all the facts and circumstances of the case" in light of the § 3553(a) factors. *Id.* at *4. Importantly, the Seventh Circuit explicitly stated that "[a]t this later stage of the sentencing proceedings, the Sentencing Commission's detailed reports on crack and cocaine sentencing may have 'practical utility' to a district court's evaluation of the facts and circumstances" of the case before it. *Id.* (citing *Eura*, 440 F.3d at 634 (Michael, J., concurring)). Similarly, in *Williams*, the Eleventh Circuit specifically acknowledged that "[i]t may be that for some of the reasons stated in the Sentencing Commission's reports, the Guidelines range in a given crack case overstates the seriousness of the particular defendant's offense . . . ." 456 F.3d at 1369 (citing *Eura*, 440 F.3d at 637 (Michael, J., concurring)).

Finally, although it did not specifically address the use of the Sentencing Commission reports in its recent decision in *United States v. Castillo*, ___ F.3d ____, 2006 WL 2374281 (2d Cir. Aug. 16, 2006), the Second Circuit has also intimated that they could be used. At the conclusion of the opinion, the court acknowledged that although it could not allow lower courts to use a ratio other

than 100:1 in calculating the guideline range in a crack cocaine case, "we would be blind to the thoughtful policy discussions of the last dozen years if we did not acknowledge what our survey of Sentencing Commission reports and recommendations . . . reveals." 2006 WL 2374281, at *21. However, after again emphasizing the need to apply the 100:1 ratio in setting the guideline range, the court stated that "[t]hat is not to say that district courts must always sentence within the ratio provided by the Guidelines; that would indeed be error under *Booker*." *Id.* These statements, when taken together and further combined with the court's citation to the First Circuit's *Pho* decision and the Eleventh Circuit's *Williams* decision, suggest that a district court within the Second Circuit – unlike those in the Fourth Circuit – could look for support from the Commission reports to use with case-specific facts in justifying a sentence below the advisory guideline range determined by reference in the first instance to the 100:1 crack/powder ratio.

In short, because the majority's approach is inconsistent with the usual practice of giving judges broad latitude in the information that they may consider at sentencing, and because the majority's approach also conflicts with that of several other circuits, this Court should grant certiorari to consider in what manner a sentencing court can consider the Sentencing Commission's reports and recommendations regarding the 100:1 crack/powder ratio.

E. The Court of Appeals' Treatment of the Factors in 18 U.S.C. § 3553(a) Conflicts With That Statute and With This Court's Decision in *Booker*

The court of appeals' opinion in *Eura* stated that after *Booker*, sentencing requires two steps. First, the district court must consult the Sentencing Guidelines and correctly calculate the range provided by the Guidelines. Second, the court must consider this sentencing range along with the other factors described in 18 U.S.C. § 3553(a) and then impose a sentence. *See* 440 F.3d at 632.

Conspicuously absent from this summary of sentencing procedure is any mention of the prefatory language found in § 3553(a), which commands that the district court "shall impose a sentence sufficient but not greater than necessary to comply with the purposes" of sentencing set forth in § 3553(a)(2). This language sets the framework for the consideration of all of the factors listed in § 3553(a), and its omission from the *Eura* opinion raises the question of whether the court of appeals ever considered it in either that case or in Petitioner's case.

Moreover, the *Eura* decision ruled that the district court did not "adequately and properly" consider § 3553(a)(6) when it sentenced the defendant. 440 F.3d at 632. Section 3553(a) lists seven factors (with sub-parts) that the court must consider. Subsection (a)(6) speaks to the need to avoid "unwarranted sentencing disparities." In concluding that the district courts erred in both *Eura* and in Petitioner's case, the court of appeals placed too much emphasis on that one factor, to the exclusion of the other six factors. But there is nothing in the plain language of § 3553(a) that indicates that any one of these factors in general, or (a)(6) in particular, should be given any more weight than any other factor.

To the contrary, Congress, in promulgating § 3553(a), did not elevate the disparity factor above the others, instead leaving the weighting of the listed factors to the judge determining an individualized sentence. Given that Congress did not choose to rank-order the importance of the various factors in § 3553(a), the court of appeals should not do so either. (And even if § 3553(a) could be construed as requiring weighting of the enumerated factors, it bears noting that the disparity factor ranks sixth out of seventh on the list, thus suggesting that it is not as important as, for example, the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *See* 18 U.S.C. § 3553(a)(2).)

Further, this Court predicted just such a debate in *Booker*, and moved preemptively to refute the idea that concern for disparity should skew post-*Booker* sentencing. Contrary to what appears to be the court of appeals' view in *Eura* that concern for disparity trumps all other § 3553(a) considerations, this Court recognized and accepted the fact that abandoning mandatory guidelines for advisory guideline and a new standard of appellate review would in some instances undercut the pursuit of uniformity. As the Court explained, it did not share the "belief that use of a reasonableness standard 'will produce a discordant symphony' leading to 'excessive sentencing disparities,' and 'wreak havoc' on the judicial system." 543 U.S. at 263 (quoting Justice Scalia's dissent, 543 U.S. at 312, 313). This is because "[t]he Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process." *Id.* However, the Court acknowledged, "[w]e cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure." *Id.*

In short, this Court should grant certiorari on Question 2 because the court of appeals elevated the need for uniformity above all other § 3553(c) considerations in a manner that conflicts with both § 3553(a) itself and with *Booker*. Question 2 thus presents an important question of federal law, S. Ct. R. 10(c), as the answer to it affects approximately 70,000 or more defendants sentenced under the Guidelines each year.[13] The Court's consideration of the question is needed to provide guidance to the district courts in the first instance, and to the courts of appeals in reviewing sentences.

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[13] *2003 Sourcebook* at 14 (Table 3); *2004 Sourcebook* at 14 (Table 3); *2005 Sourcebook* at 14 (Table 3).

CONCLUSION

For the reasons given above, Petitioner requests that this Court grant this petition for certiorari, or in the alternative, hold the petition pending the Court's determination as to whether to grant certiorari in *Eura v. United States*, No. 05-11659 (petition for certiorari filed June 20, 2006).

Respectfully submitted,

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September 5, 2006

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(9)

No. 06-6330

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK KIMBROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that, pursuant to United States v. Booker, 543 U.S. 220 (2005), a federal district court has the authority to impose a sentence below the advisory Guidelines range in order to counteract the Guidelines' more severe treatment of crack as compared to powder cocaine offenses.[1] The government has

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[1] The petition also raises the question of how a district court should "consider and balance the various factors spelled out in [18 U.S.C. 3553(a)], and in particular, subsection (a)(6), which addresses 'the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct.'" Pet. i. That question is not presented in this case, however, because there is no indication either in the decision below or in the decision on which it relied, United States v. Eura, 440 F.3d 625 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006), that the court of appeals believed that "concern for disparity trumps all other § 3553(a)

previously explained why that contention does not warrant this Court's review. See U.S. Br. in Opp. in Eura v. United States, No. 05-11659 (2006 WL 2789851).

On November 3, 2006, this Court granted certiorari in Claiborne v. United States, No. 06-5618, and Rita v. United States, No. 06-5754, limited to questions formulated by the Court to address various aspects of sentencing procedure under Booker. This case need not be held for the decisions in Claiborne and Rita, in which the questions formulated by the Court do not include the question whether a sentencing court has the authority to consider the crack-powder disparity when imposing sentence, or, more broadly, to consider imposing a non-Guidelines sentence based solely on the court's disagreement with a sentencing policy adopted by Congress. See U.S. Br. in Opp. at 8-10, Wideman v. United States, No. 06-6921 (2006 WL 3505370). Accordingly, the petition for a writ of certiorari should be denied.

In the alternative, to the extent that the Court has determined to hold the petitions in Eura, Wideman, and other cases raising essentially the same issue for the decisions in Claiborne and Rita, the Court should accord similar treatment to the present petition by holding it for Claiborne and Rita and then disposing of

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considerations" (Pet. 20). In Eura, the court of appeals merely concluded that the district court "did not adequately and properly consider" Section 3553(a)(6), 440 F.3d at 632; and in the decision below, the court of appeals did not say anything about Section 3553(a)(6), Pet. App. 1a-3a.

it as appropriate in light of the decision in those cases.[2]

PAUL D. CLEMENT
Solicitor General

JANUARY 2007

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[2] The government waives any further response to the petition unless this Court requests otherwise.

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its memorandum in opposition in this case, the government relies upon the brief in opposition it filed on September 19, 2006, in *Eura v. United States*, No. 05-11659 (hereafter "*Eura* Br. in Opp."). Memorandum for the United States in Opposition at 1-2. Petitioner accordingly replies to several points in the *Eura* opposition.[1]

[1] The government asserts that the *Eura* case is in an interlocutory posture because it has been remanded for resentencing, and that such posture alone justifies denial of the petition. *Eura* Br. in Opp. at 7 n.1. *Claiborne v. United States*, No. 06-5618, came to the Court in a similar posture, in that the district court had imposed a below-Guidelines sentence, the government appealed, and the court of appeals reversed and remanded for resentencing. This Court, however, deemed the issues raised by *Claiborne* to be of sufficient importance to warrant its review notwithstanding the case's procedural posture. The Court should do the same in the instant case.

1. The government proffers two merits-based arguments as to why the court of appeals' ruling in the *Eura* case (and therefore in Petitioner's case) was correct. Neither is persuasive.

a. The government first asserts that because Congress has decided as a policy matter that crack cocaine offenders should be sentenced more severely than powder cocaine offenders, the courts of appeals have correctly determined that district courts cannot consider the crack/powder ratio because doing so "would usurp Congress's proper role in setting sentencing policy for cocaine offenses." *Eura* Br. in Opp. at 11-12. This argument fails because the situation that the courts of appeals and the government decry already occurs, for example in the context of the so-called "career offender" guideline.

To explain, when enacting the Sentencing Reform Act, Congress directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants convicted of controlled substance offenses or crimes of violence who have two previous convictions for either crimes of violence or controlled substance offenses. 28 U.S.C. § 994(h). The Sentencing Commission fulfilled this directive by creating the career offender guideline. *See* U.S.S.G. § 4B1.1. (In notable contrast, as explained in the petition for certiorari, Congress has never explicitly directed the Sentencing Commission to incorporate the 100:1 crack/powder ratio into the Guidelines. *See* Petition for Writ of Certiorari at 13-14.) It is unquestioned in career offender cases, however, both before and after this Court made the Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005), that sentencing judges may impose sentences lower than what the advisory guideline calculations call for. *See* U.S.S.G. § 4A1.3(b)(3)(A), p.s. (eff. Nov. 1, 2003) (in policy statement, acknowledging district court's authority to impose lower sentence in career offender cases by placing partial limitation on that authority).

b. The government further argues that "giving district courts the discretion to disregard the 100:1 ratio would run afoul of 18 U.S.C. § 3553(a)(6) by creating 'unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct'" in part because "courts inevitably would exercise their discretion in different ways . . . ." *Eura*. Br. in Opp. at 12. Like the preceding argument, this argument is a red herring because the situation the government describes also already occurs, again in the context of the "career offender" guideline.

As described above, defendants who commit controlled substance offenses or crimes of violence who also have two qualifying prior convictions for controlled substance offenses or crimes of violence are deemed to be career offenders. 28 U.S.C. § 994(h); U.S.S.G. § 4B1.1. To parallel the government's example, *see Eura* Br. in Opp. at 12, when asked to impose a lower sentence in a career offender case, one court might go lower on the basis of the instant offense; another court might go lower on the basis of the nature of the prior convictions; another court might go below the advisory guideline range based on a combination of the instant offense and prior convictions; and still another might decline to go below the guideline range at all. Yet no one would question those courts' authority to impose lower sentences on career offenders, notwithstanding Congress's express directive that such defendants be sentenced at or near the statutory maxima for their offenses of conviction, even though those courts might exercise their discretion in different ways. Sentencing in crack cocaine cases should be treated no differently, especially where – unlike career offender cases – there is no congressional directive to the Sentencing Commission to apply the 100:1 crack/powder ratio.

2. The government claims that, like the First Circuit's decision in *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006), the Fourth Circuit's *Eura* decision allows a district court to consider the nature of the drug and the severity of the advisory guideline range because the decision "expressly 'envision[ed] instances in which some of the § 3353(a) factors will warrant a variance in a crack cocaine case,'" when the sentencing court makes individualized findings that fit within the § 3553(a) factors. *Eura* Br. in Opp. at 16 n.2 (quoting *United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006)). A fair reading of the *Eura* opinion, though, is that the majority is referring to facts other than the nature of the drug or the severity of the guideline range. *See Pho*, 433 F.3d at 65. If the majority intended to adopt the *Pho* court's view, then there would have been no need for Judge Michael to write separately to highlight the role that the Sentencing Commission's reports should play in crack cases. And if *Eura* held what the government claims it did, then the other circuits would have relied on its majority opinion, not Judge Michael's opinion

Further, in a critical distinction from the *Eura* case, the district court in Petitioner's case found specifically that the offense involved powder cocaine as well as crack cocaine. Pet. App. 25a. (In fact, Petitioner had considerably more powder than crack, yet it was the crack that drove the advisory guideline range calculations.) Notwithstanding the district court's application of the § 3553(a) factors to the particular facts of Petitioner's case, however, the court of appeals summarily vacated the sentence based on *Eura*. *See* Pet. App. 2a.

3. At the time that it filed its opposition in the *Eura* case in September of 2006, the government claimed that "[t]he court of appeals' decision does not conflict with any decision of any other court of appeals." *Eura* Br. in Opp. at 18. Since that time, the conflict has in fact deepened further.

On December 5, 2006, the U.S. Court of Appeals for the Eighth Circuit, sitting en banc, decided *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc). In a 10-2 ruling, the majority held that "we now join our sister circuits in holding [that] neither *Booker* nor § 3353(a) authorizes district courts to reject the 100:1 quantity ratio and use a different ratio in sentencing defendants for crack cocaine offenses." 469 F.3d at 1176. In so holding, the *Spears* majority specifically rejected the position taken by the Third Circuit in its *Gunter* decision: "We do not adopt or endorse the Third Circuit's opinion that the crack/powder cocaine differential in the Guidelines may be a factor in the post-*Booker* sentencing process." *Id.* at 1175; *see United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006).[2]

Two judges in *Spears*, however, dissented from the decision. They disagreed with the majority because in their view, "if we start from the premise the guidelines' system is advisory, any advice given within such a system [such as the 100:1 ratio] cannot be binding by its very nature, no matter whether the advice is on matters of broad policy or otherwise." *Id.* at 1179 (Bye, J., dissenting, joined by Lay, J.). Accordingly, they concluded that "[i]t is therefore inconsistent with *Booker* to hold that district courts must follow congressional advice, or policy, when it is given within the context of an advisory system." *Id.* Similarly, in *United States v. Williams*, 472 F.3d 835 (11th Cir. 2006) (denying rehearing en banc of decision at 456 F.3d 1353 (11th Cir. 2006)), one judge argued that the majority's position requiring sentencing courts to apply the 100:1 ratio as

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[2] The government suggested in its *Eura* opposition that the import of *Gunter* is not clear. *See Eura* Br. in Opp. at 18 n.3. Petitioner respectfully counters that the Eighth Circuit's view in *Spears* makes clear what position the Third Circuit has taken: that after a district court has applied the 100:1 ratio in determining the advisory guideline range, the court has the discretion to consider the impact of the differential in determining whether to impose a sentence below the advisory range pursuant to § 3553(a). *See* 462 F.3d at 249. Accordingly, it is apparent that the Third Circuit's position conflicts with that adopted by the Eighth Circuit in *Spears* and by the Fourth Circuit in *Eura*.

incorporated in the Sentencing Guidelines violates *Booker* by making the drug guideline mandatory again. *Id.* at 843, 847-49 (Barkett, J., dissenting).

In short, the courts of appeals have adopted varying positions regarding whether a district court may take into account the impact of the 100:1 crack/powder ratio or consider the information provided in the several reports issued by the Sentencing Commission. On one end of the spectrum are the Fourth and Eighth Circuits, which have held that under no circumstances can a district court consider either the ratio or the reports. *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659); *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc). In the middle is the dissenting judge in the Fourth Circuit, whose position has been adopted by the Seventh and Eleventh Circuits, and possibly by the Second Circuit, which would permit a district court to use the Sentencing Commission reports in evaluating the case before it. *Eura*, 440 F.3d at 635 (opinion of Michael, J.); *United States v. Jointer*, 457 F.3d 682, 687 (7th Cir. 2006), *petition for cert. filed* Oct. 27, 2006 (U.S. No. 06-7600); *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006), *petition for cert. filed* Oct. 19, 2006 (U.S. No. 06-7352); *see United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *see also United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006) (clarifying that while district court may not disregard 100:1 ratio, "[b]y the same token, we do not intend . . . to suggest that, in a drug-trafficking case, the nature of the contraband and/or the severity of the projected guideline sentence may not be taken into account on a case-by-case basis"). Finally, on the other end of the spectrum is the Third Circuit, joined by the dissenting judges in the Eighth and Eleventh Circuits, which would allow a district court to consider the 100:1 ratio. *United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006); *Spears*, 469 F.3d at 1182 (Bye, J., dissenting, joined by Lay, J.); *Williams*, 472 F.3d at 843, 847-49 (Barkett, J., dissenting from denial of rehearing en banc).

Accordingly, this Court should step in now to resolve the issue presented in Question 1 of the petition for certiorari: Whether, in light of the two holdings in *Booker*, may a district court consider either the impact of the so-called "100:1 crack /powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio in carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant?

CONCLUSION

For the reasons given above, Petitioner requests that this Court grant this petition for certiorari.

Respectfully submitted,

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In The Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

I. BEYOND SETTING THE MANDATORY MINIMUM AND MAXIMUM PENALTIES SPECIFIED BY 21 U.S.C. § 841(b)(1), CONGRESS HAS NOT BOUND SENTENCING COURTS OR THE SENTENCING COMMISSION TO APPLY THE 100:1 POWDER/CRACK COCAINE RATIO.

Mr. Kimbrough argues that, under this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), a sentencing court has discretion under the Sentencing Reform Act (SRA) to disagree on policy grounds with sentencing guidelines, including the 100:1 powder/crack cocaine ratio, based on reliable and relevant information such as the U.S. Sentencing Commission's reports setting forth the many problems with the ratio. In response, the government concedes that sentencing courts generally have discretion to disagree with the Guidelines when the disagreement is based on policy grounded in the goals of the SRA and not on case-specific facts. *See* U.S. Br. 29, 43-44. It also concedes that a sentencing court may consider the reports issued by the Sentencing Commission in determining an appropriate sentence for a particular defendant charged with a crack cocaine offense. U.S. Br. 45.

Notwithstanding these concessions, the government urges this Court to affirm the Fourth Circuit's ruling that disagreement with the 100:1 ratio is *per se* unreasonable. In support of its argument, the government advances the novel proposition that there are actually two types of sentencing guidelines. On the

one hand, the government claims that there are "guidelines that simply implement the SRA" through instructions to the Sentencing Commission, which a district court may reject for policy reasons. U.S. Br. 29, 30. On the other hand, according to the government, there are "guidelines that incorporate congressional policy in a manner that binds district courts even after *Booker*." U.S. Br. 30.

The government contends that the 100:1 guideline ratio falls into the latter category. This is so, the government claims, because a 100:1 ratio is set forth in 21 U.S.C. § 841(b)(1) and constitutes a "direct sentencing requirement[] imposed on courts" – albeit an implicit one – to apply the ratio in determining where within the statutory range to impose a sentence. The government further claims that, because the 100:1 ratio is binding on the courts, the Sentencing Commission was required to incorporate it into the drug quantity table of U.S.S.G. § 2D1.1 at all potential quantity levels in order to provide a sentencing scheme that purportedly "avoids unwarranted disparities." U.S. Br. 29-30, 32, 33-34.

The government's argument fails on numerous grounds. Section 841(b)(1) on its face does no more than set mandatory minimum and maximum penalties for trafficking in controlled substances, including crack and powder cocaine. The government's proposition that the statute must be read to imply a sentencing scheme beyond its plain language not only violates basic principles of statutory construction, but has already been rejected by this Court. Moreover, it would effectively reinstate the mandatory nature of the drug guideline in crack cocaine cases, creating a large, unworkable

exception to the Court's remedial opinion in *Booker*. Accordingly, the government's argument must be rejected and the Fourth Circuit's decision reversed.

A. Congress May Limit Sentencing Courts' Discretion Only Through Plain Statutory Language.

The government argues that § 841(b)(1) sets forth the 100:1 ratio as a "direct sentencing requirement," U.S. Br. 29, but it concedes that this claimed requirement is not explicit in the statute, U.S. Br. 32, 33, and it does not identify any other statute requiring incorporation of the 100:1 ratio into U.S.S.G. § 2D1.1's drug table. Moreover, the government fails to point to any canon of statutory construction that would read the language it desires into the Anti-Drug Abuse Act of 1986, *see* Pub. L. No. 99-570, 100 Stat. 3207 (ADAA), which established the ratio. Despite these failings, the government theorizes that the ADAA silently infused the 100:1 ratio into the Guidelines as a binding policy. U.S. Br. 30-34. To support the existence of this implicit, silent directive, the government relies on an event occurring nine years after passage of the ADAA: Congress's 1995 rejection of the Sentencing Commission's proposal to adopt a 1:1 guideline ratio between crack and powder cocaine. U.S. Br. 35-37 & n.10; *see* Pub. L. No. 104-38, 109 Stat. 334 (1995). According to the government, Congress's rejection made clear its intent in the ADAA that sentencing courts and the Commission were "required . . . to take drug quantities into account, and to

do so in a manner that respects the 100:1 ratio." U.S. Br. 35.

The rejection of the guideline amendment proposing the 1:1 ratio is not evidence that the 100:1 ratio was required, silently, by § 841(b)(1). The rejection was not even a directive to the Commission that it must use the 100:1 ratio. The plain language of the 1995 act makes clear that Congress did no more than instruct the Commission to formulate a new proposal that would reflect several considerations, including that the ratio for powder and crack cocaine be "consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a)." Pub. L. No. 104-38, § (2)(a)(2). Another consideration was that "the sentence imposed for trafficking in a quantity of crack cocaine *should generally exceed* the sentence imposed for trafficking in a like quantity of powder cocaine"). *Id.* § 2(a)(1)(A) (emphasis added). An expression that sentences for crack cocaine offenses "should generally exceed" those for powder cocaine offenses is far from a command that the 100:1 ratio must remain, particularly when Congress also charged the Commission to bring the powder/crack cocaine ratio in line with ratios for other drugs.[1]

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[1] The ratios between crack cocaine and the other drugs listed in § 841(b)(1) range from 1:1 (methamphetamine (actual) to crack) to 2:1 (PCP (actual) to crack), to 10:1 (methamphetamine mixture to crack), to 20:1 (PCP mixture to crack and heroin to crack), and to 1:5 (LSD to crack). It was Congress's concern about the anomalously high 100:1 powder/crack cocaine ratio that led the Sentencing Commis-

(Continued on following page)

Contrary to the government's suggestion, Congress's actual directive that crack cocaine sentences "generally exceed" powder cocaine sentences was followed in this case: Mr. Kimbrough received the mandatory minimum sentence of ten years for his drug convictions, rather than the roughly three-year sentence that he likely would have received had the 148 grams of cocaine he possessed consisted entirely of powder cocaine. *See* U.S.S.G. § 2D1.1(c)(11) (drug quantity table); U.S.S.G. Ch. 5, Pt. A (sentencing table).

Lacking support in the plain language of the 1995 act, the government turns to its legislative history in an attempt to support its claim that the Guidelines' drug table must follow § 841(b)(1).[2] U.S. Br. 36-37. The

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sion to propose a change to the guideline. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, § 280006, 108 Stat. 1796, 1985, 2097 (directing Commission to "address the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels").

[2] When the language of a statute is plain – as is that of § 841(b)(1) and the 1995 act – resort to legislative history in search of a contrary meaning is improper. *See Whitfield v. United States*, 543 U.S. 209, 215 (2005); *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130-36 (2002); *UnitedStates v. Gonzales*, 520 U.S. 1, 6 (1997); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Crandon v. United States*, 494 U.S. 152, 160 (1990); *United States v. Ron*

(Continued on following page)

government claims that floor statements of two members of Congress show that "any significant change in sentencing for crack-cocaine offenses would require legislative action." *Id.*; *see id.* at 8-9. The government then asks this Court to infer from those statements that the 100:1 ratio was placed into the Guidelines by statute. No such inference can be drawn. The quoted members merely expressed disagreement with the proposed 1:1 ratio and recognized that many crack offenders were subject to statutory mandatory minimums. *See, e.g.*, 141 Cong. Rec. 27,203 (1995) (statement of Sen. Abraham) (expressing concern that "some powder defendants at the top of crack distribution networks seem to be getting lower sentences than retail [crack] distributors" and that "while there is good reason for significant differential treatment of powder and crack, we should have a look more generally at whether the present differential represents the best policy"). And far from requiring incorporation of the 100:1 ratio, one of the quoted members suggested that the Commission was free to reject it, at least in favor of higher sentences. *See id.* (opining that "the Commission resolved these concerns the wrong way: by lowering sentences for crack rather than by raising sentences for powder" and that "I would like to see these issues addressed from the other end: by raising the sentences for powder distribution").

Pair Enterprises, Inc., 489 U.S. 235, 240-41 (1989). The government's resort to legislative history, not even of the ADAA itself but of a different law passed nine years later by a different Congress, serves only to emphasize the weakness of its argument.

In any event, "[f]loor statements of two [legislators] cannot amend the clear and unambiguous language" of an act of Congress. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002). "[T]he statements of individual Members of Congress [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390 (2000) (Scalia, J., concurring). Instead, "[t]he *only* reliable indication of *that* intent – the only thing we know for sure can be attributed to *all* of them – is the words of the bill that they voted to make law," *id. at* 390-91 (emphasis in original), as the Court has recognized for many years, *see Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) (stating that "[t]he law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself").

In § 841(b)(1), Congress as a whole did no more than set out minimum and maximum penalties for controlled substance offenses, including powder and crack cocaine. Congress did not direct the district courts to impose sentences, or the Sentencing Commission to promulgate guidelines, that apply the 100:1 powder/crack cocaine ratio at sub-tiers within the statutory penalty ranges.

B. This Court Has Already Rejected The Requirement That The Drug Table Must March In Lockstep With 21 U.S.C. § 841(b)(1).

To bolster its claim that Congress has implicitly required sentencing courts and the Sentencing Commission to apply the 100:1 ratio in setting all

sentences in crack cocaine cases, the government asserts the existence of an "implicit . . . structural determination" in the ADAA, U.S. Br. 32, that would make it "logically incoherent to read [it] not to require the Commission and sentencing courts to apply a graduated penalty structure that takes drug quantity into account (and does so in a manner that respects the 100:1 ratio)." U.S. Br. 33-34; *see id.* at 35. The Court, however, has already rejected the government's argument that the drug table contained in U.S.S.G. § 2D1.1 must march in lockstep with § 841(b)(1).

In *Neal v. United States*, 516 U.S. 284 (1996), the Court considered whether the method for determining the weight of LSD on a carrier medium under the drug guideline must be the same as the method used by § 841(b)(1). The case arose from the Commission's amendment in 1993 of § 2D1.1 to create a presumptive weight based on dosage for LSD after it studied the LSD trade and concluded that the method used for calculating statutory mandatory minimum LSD weights did not "fulfill the statutory directive [to the Commission] to promote proportionate sentencing." 516 U.S. at 292; *see Chapman v. United States*, 500 U.S. 453 (1991) (holding that calculation of LSD weight for purposes of determining applicable mandatory minimum sentence must include entire weight of carrier medium). The Commission concluded that the continued use of the mandatory-minimum method in the Guidelines "'would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), *as well as sentences disproportionate to those for other*, more dangerous controlled substances, such as

PCP.'" *Neal*, 516 U.S. at 293 (quoting U.S.S.G. § 2D1.1, comment. (backg'd)) (emphasis added). In unanimously affirming the use of two different weight-calculation methods, the Court recognized that "the Guidelines calculation is independent of the statutory calculation" and that "[e]ntrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable 'approach' to calculating LSD quantities." *Id.* at 294-95.

The Court's statements in *Neal* refute the government's contention that because § 841(b)(1) employs the 100:1 powder/crack cocaine ratio, the Guidelines' drug table must do so as well. As the *Neal* Court found, § 841(b)(1) and the Guidelines do *not* have to operate in the same way, notwithstanding the possibility that inconsistencies may result between sentences under the Guidelines and sentences under the statute. *See* 516 U.S. at 295 (tolerating inconsistency between the statute and the drug guideline even though "there may be little in logic to defend the statute's treatment of LSD [because] it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers"). *Neal* makes clear, contrary to the government's position, that the Commission has discretion to take an approach to determining drug quantity other than that found in § 841(b)(1), so long as a sentencing court, when determining a sentence in a particular drug case, applies the mandatory minimum and maximum limits plainly stated in § 841(b)(1). That is exactly what the sentencing court did in Mr. Kimbrough's case.

The government also asserts that failing to apply the 100:1 ratio to all crack cocaine sentences "would lead to drastic and obviously unwarranted sentencing disparities, or 'cliffs,' based on insignificant differences in drug quantities." U.S. Br. 33. A similar argument failed in *Neal*, which acknowledged the reality that "cliffs" are already part of the *current* sentencing structure. *See* 516 U.S. at 291-92 (noting that "cliffs" result from "incongruities between the Guidelines and the mandatory [drug] sentencing statute"). Such "cliffs" exist not only in the differing treatment of crack and powder cocaine and of LSD mixtures and dosages, but also in the treatment of cocaine base itself. *See* U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, Note (D) (providing that "'[c]ocaine base,' for the purposes of this guideline, means 'crack,'" such that cocaine base that is not crack is treated as powder for purposes of the drug table).[3]

C. Disagreement With The 100:1 Ratio Does Not Automatically Create Unwarranted Disparities And May In Fact Avoid Them.

The government argues that the use of any method of setting crack cocaine sentences other than the 100:1

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[3] Such "cliffs" also occur with respect to marijuana plants. *Compare* U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, Note (E) (treating marijuana plant as equal to 100 grams of marijuana unless actual weight is higher) *with, e.g.*, 21 U.S.C. § 841(b)(1)(A)(vii) (establishing ten-year mandatory minimum sentence for "1,000 marijuana plants regardless of weight").

ratio – such as taking § 841(b)(1) as it is written to set only statutory ranges like any other statute setting penalties for criminal offenses – would lead to unwarranted sentence disparities in drug cases, in contradiction of 18 U.S.C. § 3553(a)(6). U.S. Br. 39-42. According to the government, an interpretation of § 841(b)(1) "under which Congress has done nothing more than establish statutory minimums for certain drug offenses . . . would leave courts free not only to impose *lower* sentences for crimes involving crack cocaine . . . but also to impose *higher* sentences for crimes involving *powder* cocaine." U.S. Br. 39 (emphasis in original). The government asserts that this reading of § 841(b)(1) "would leave courts free to adopt whatever views they wished about the comparative severity of drugs (subject only to the statutory sentencing ranges and reasonableness review)." *Id.* The government does not explain why reasonable comparisons of drug offense severity would result in unwarranted sentencing disparity. Indeed, its argument reveals an unjustified disregard for the ability of sentencing courts to implement the statutory directives of § 3553(a) when considering the reliable and relevant information presented to them.

The government's argument wholly ignores the reasonable limitation on unbridled discretion that Mr. Kimbrough has suggested: in imposing sentences, district courts are permitted to use a wide range of information so long as the information is reliable and relevant to the § 3553(a) considerations. *See* Pet. Br. 17-24. Federal district courts routinely make determinations about the reliability and relevance of

information, even in the context of complex issues, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590-91 (1993), and this Court relies on their "'learning, good sense, fairness and courage'" in doing so, *see Brown v. Illinois*, 422 U.S. 590, 604 n.10 (1975) (quoting *Nardone v. United States*, 308 U.S. 338, 342 (1939)). Particularly when coupled with the abuse-of-discretion standard of review set out in *Booker* and *Rita v. United States*, 127 S. Ct. 2456 (2007), the "reliable and relevant information" test provides a coherent limiting principle that will prevent unaccountably disparate sentences.

For example, if the government were to present a court with reliable information that supported a determination that a guideline sentence in a powder cocaine case would be too low as compared to crack cocaine cases in light of the purposes of sentencing set forth in § 3553(a)(2), the court would be free to consider that information. Here, the sentencing court was presented with reliable information that the crack cocaine guideline sentence was too high. There was no reason that the information could not be considered in determining the sentence under § 3553(a)(2).

Finally, the government does not attempt to support its contention that prohibiting sentencing courts from disagreeing on a reasoned basis with the 100:1 ratio would avoid unwarranted disparities. Indeed, the opposite is true, as the 100:1 ratio does not reflect even a "rough approximation of sentences that might achieve [the] objectives" of the Sentencing Reform Act, *Rita*, 127 S. Ct. at 2464-65, as the Sentencing Commission has concluded in general and the sentencing court concluded

in particular in this case. Yet, the government contends that courts must impose sentences in accordance with the 100:1 ratio not only at the two mandatory minimum levels directed by Congress in 21 U.S.C. § 841(b)(1)(A) and (B), but at all levels interpolated by the Commission in U.S.S.G. § 2D1.1. The result of the government's argument is that a crack cocaine sentence imposed within the applicable guideline range would be presumed reasonable on appeal based on the fiction that both the Commission and the sentencing court independently concluded that the sentence met the requirements of § 3553(a). *See Rita*, 127 S. Ct. at 2463, 2465, 2467-68. Such a result is contrary both to the goals of the Sentencing Reform Act and the expertise and experience of the Commission and sentencing courts.

D. The Government's Rule Would Reinstate A Mandatory Guideline For Crack Cocaine.

Even if the government is right that the 100:1 ratio is mandatory, its argument fails on constitutional grounds, as it would return sentencing in crack cocaine cases to the mandatory guidelines struck down by this Court in *Booker*. The government disputes that a rule prohibiting the district court from reducing a defendant's sentence based on its disagreement with the crack cocaine guideline would reinstate the mandatory nature of the crack cocaine guideline and would violate the Sixth Amendment. U.S. Br. 43-46. It claims that no constitutional issue arises because the sentencing court could still vary from the crack guideline range based on case-specific facts such as the "individualized

circumstance" that the defendant "did not carry a weapon or otherwise threaten violence," or a policy disagreement with a guideline implicated in the case *other than* U.S.S.G. § 2D1.1, such as the adjustment for role in the offense (*see* U.S.S.G. §§ 3B1.1, 3B1.2) or the policy statement deeming military service not ordinarily relevant (*see* U.S.S.G. § 5H1.11). U.S. Br. 44-45.

Contrary to the government's argument, such a guideline would be mandatory and subject to the Sixth Amendment rule in *Booker*. Under the government's proposed rule, the sentencing court could find facts that were not found by a jury or admitted by the defendant to calculate the guideline range, but would be prohibited from sentencing below the guideline range based on a policy disagreement with the 100:1 ratio reflected in § 2D1.1, and would be required to impose a sentence using that ratio except on the basis of individual case-specific factors. This would effectively replicate the guideline-and-departure system held unconstitutional in *Booker*. *See* 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself."). It would violate the Sixth Amendment because it would not permit a court to sentence outside the guideline range dictated by U.S.S.G. § 2D1.1 based on "general objectives of sentencing" alone without a "factfinding anchor." *Cunningham v. California*, 127 S. Ct. 856, 863 (2007); *see also id.* at 862-70.[4]

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[4] The government appears to claim that its rule would not violate the Sixth Amendment because, although a sentencing court could not vary downward based on a policy disagree-

(Continued on following page)

This Court should not adopt a reading of § 841(b)(1) that would raise such constitutional concerns.[5] *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Because under the government's proposed rule, judicial factfinding as to drug quantity in crack cocaine cases would be binding, the Court must either reject the rule or hold that the

---

ment with the 100:1 ratio, it could still vary *upward* based on a policy disagreement with it. *See* U.S. Br. 46 (stating that "[a]s long as the district court can sentence *above* the Guidelines range without finding an additional *fact*, a rule that takes a single policy consideration off the table presents no Sixth Amendment difficulty") (emphasis supplied and in original). However, this Court in *Booker* explicitly rejected the "one-way ratchet" the government promotes as inconsistent with congressional intent. *See* 543 U.S. at 257-58, 266.

[5] These constitutional concerns are not merely hypothetical, for sentencing courts routinely resolve factual disputes as to quantity in crack cocaine cases. Indeed, in *Booker* itself, thisCourt noted that while Freddy Booker was convicted at trial based on evidence of the 92.5 grams of crack cocaine found in his duffel bag, the district court found at his sentencing that he was responsible for an additional 566 grams of crack. 543 U.S. at 227; *see also, e.g.*, *United States v. Ricks*, 494 F.3d 394 (3d Cir. 2007) (where defendants pled guilty and reserved challenge to drug quantity, district court found after evidentiary hearing that each defendant was responsible for at least 2,000 grams of crack cocaine, 3,000 grams of powder cocaine, and 30 grams of heroin); *United States v. Pho*, 433 F.3d 53, 57 (1st Cir. 2006) (where defendant was arrested with 16.73 grams of crack and pled guilty to possessing only 5 or more grams, district court's finding that defendant was responsible for 40.43 grams increased base offense level from 26 to 30).

guideline tiers for quantity and type of drug must be charged in an indictment and proved to a jury beyond a reasonable doubt in every case. As the Court held in *Booker*, rejection of the government's proposed rule would better accord with congressional intent. *See* 543 U.S. at 759-64.

II. THE DISTRICT COURT PROPERLY ACTED WITHIN ITS DISCRETION IN SENTENCING MR. KIMBROUGH.

Even if the Court accepts the government's statutory and constitutional arguments, it should uphold the sentence imposed by the district court. In making its claim that a rule prohibiting disagreement with the 100:1 ratio does not make the ratio mandatory in violation of the Sixth Amendment, the government concedes that district courts may rely upon the various reports issued by the Sentencing Commission regarding crack cocaine in fashioning an appropriate sentence under 18 U.S.C. § 3553(a). U.S. Br. 45. It states that "[w]hile courts could not rely on those reports as a basis for *categorically* disagreeing with the 100:1 ratio, courts could properly consider those reports in determining whether a particular defendant's commission of a crack-cocaine offense implicates the policy reasons underlying Congress's harsher treatment of crack offenses." U.S. Br. 45. The government also concedes that individual facts of a particular case would allow a sentence below that called for by the 100:1 ratio. U.S. Br. 45. Applying this position to Mr. Kimbrough's case, the sentence imposed by the district court was certainly not

an abuse of its discretion, and no remand for resentencing is needed.

The district court did not "categorically" disagree with the 100:1 ratio. Although it referenced the Sentencing Commission reports criticizing the ratio, the court was careful to make clear that it was finding only that it was inappropriate *in this case* to impose the sentence resulting from application of the ratio. *See, e.g.*, J.A. 72 (stating that "a sentence of 19 to 22 years *in this case* . . . imposes more punishment, *given the record here*, than is necessary to accomplish what needs to be done") (emphasis added); *id.* at 74 ("The Court also considers significantly the fact that the crack cocaine involved *in this case* does in fact exaggerate the advisory sentencing guideline involved *in this case*.") (emphasis added); *id.* ("So the Court believes should it follow the advisory guidelines, the penalty imposed would clearly be inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish *in this case*.") (emphasis added); *id.* (in pronouncing the sentence of 180 months, stating "[t]hat's 15 years, which is clearly long enough *under the circumstances*") (emphasis added).

The court based its sentencing decision on the "nature and circumstances" of Mr. Kimbrough's offense, *see* 18 U.S.C. § 3553(a)(1), not on a wholly generic disagreement with the 100:1 ratio. The court determined that "this defendant and another defendant were caught sitting in a car with some crack cocaine and powder by two police officers – that's the sum and substance of it – with a firearm. The Court understands how the offense was committed. The Court heard the facts in this

particular case." J.A. 72-73. These facts, when combined with the court's findings regarding Mr. Kimbrough's military service, his steady work history, and his lack of a felony record, J.A. 73-74, led the court to conclude that a sentence within the range produced by the 100:1 ratio was "greater than necessary" and that a 120-month sentence for the drug offenses, particularly when combined with the consecutive 60-month sentence for the firearms offense, was "long enough." J.A. 74.

Thus, there were individual facts in Mr. Kimbrough's case that allowed for a sentence below that called for by the 100:1 ratio, and the district court did precisely what it was supposed to do within the framework provided by Congress in the Sentencing Reform Act. *See* 18 U.S.C. § 3553(a) (court shall impose a sentence sufficient but not greater than necessary to comply with enumerated purposes of sentencing). In short, the district court's imposition of a sentence based on the Sentencing Commission's reports in combination with the facts of the offense and Mr. Kimbrough's background was an appropriate exercise of the court's discretion. No remand for resentencing is necessary.

CONCLUSION

For the above-stated reasons and those given in Mr. Kimbrough's opening brief, the Court should reverse the decision of the Fourth Circuit with instructions to affirm the judgment of the district court.

Respectfully submitted,

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September 25, 2007

70

(13)

No. 06-6330

2 4 2007

In The
Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME I (Pages 1 to 101)

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Certiorari Granted June 11, 2007

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RELEVANT DOCKET ENTRIES

KIMBROUGH v. UNITED STATES

United States District Court
Eastern District of Virginia (Norfolk)

CRIMINAL DOCKET FOR CASE #:
2:04-cr-00185-RAJ-TEM-2

09/13/2004	1	INDICTMENT RETURNED AND FILED IN OPEN COURT as to Joel Renato Flowers (1) count(s) 1, 2, 3, 4, 5; Derrick Kimbrough (2) count(s) 1, 2, 3, 4; On motion of the Govt., the Court directed warrant to be issued, no bond recommendation – Govt. to move for detention (arou) (Entered: 09/14/2004)

* * *

09/27/2004	6	ORDER Appointing Federal Public Defender for Derrick Kimbrough, entered & filed 9/27/04 (Signed F. Bradford Stillman, USMJ) (arou) (Entered: 09/27/2004)

* * *

01/11/2005	–	Plea Agreement Hearing as to Derrick Kimbrough held before Judge Raymond A. Jackson (Sharon Borden, OCR). USA appeared through: William Muhr, AUSA. Dft. present in custody appeared through: Riley H. Ross, III, AFPD. Dft. requested to withdraw plea of not guilty to counts 1,2,3 & 4 & enter a plea of guilty to said counts. Court fully advised dft. re proceedings & his rights & dft. acknowledged he understood. NO PLEA AGREEMENT. NO STATEMENT OF FACTS. Court explained to dft. that by pleading guilty he waived jury trial. Dft.

satisfied with services of counsel. Court Hours: 2:30-3:08 (popo) (Entered: 01/11/2005)

01/11/2005 – PLEA entered by Derrick Kimbrough. Court accepts plea by Derrick Kimbrough Guilty: Derrick Kimbrough (2) counts 1, 2, 3 & 4. Continued for PSR. Dft. remanded. (popo) (Entered: 01/11/2005)

* * *

03/10/2005 29 POSITION with Respect to Sentencing Factors by USA as to Derrick Kimbrough (arou) (Entered: 03/10/2005)

03/30/2005 30 RESPONSE by USA as to Derrick Kimbrough's sentencing position (arou) (Entered: 03/31/2005)

04/01/2005 31 POSITION with Respect to Sentencing Factors by Derrick Kimbrough (arou) (Entered: 04/01/2005)

04/11/2005 – Sentencing before Judge Raymond A. Jackson, USDJ held (Sharon Borden, OCR) USA appeared through: William Muhr, AUSA. Dft (in custody) appeared through: Gretchen Taylor (fpd) counsel for Derrick Kimbrough (2). Sentenced on count(s) 1, 2, 3, 4 (rlam) (Entered: 04/11/2005)

04/14/2005 32 JUDGMENT as to Derrick Kimbrough (2) count(s) 1: One Hundred Eighty (180) Months Imprisonment, to be served consecutively. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment; Count(s) 2.: One Hundred Twenty (120) Months Imprisonment, to be served consecutively. Five (5) Years Supervised Release, to run concurrently.

$100.00 Special Assessment; Count(s) 3: One Twenty (120) Months Imprisonment, to be served consecutively. Three (3) Years Supervised Release, to run concurrently. $100.00 Special Assessment; Count(s) 4: Sixty (60) Months Imprisonment [to] be served consecutively. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment; deft remanded to custody of USM, entered & filed 4/14/05 (Signed Judge Raymond A. Jackson) Copies Mailed: 4/14/05, ob (arou) (Entered: 04/14/2005)

* * *

04/21/2005 33 TRANSCRIPT filed in case as to Derrick Kimbrough for dates of 4/11/05 (Sentencing) (ptom) (Entered: 04/21/2005)

04/22/2005 35 AMENDED JUDGMENT: Derrick Kimbrough (2) Count 1: Imprisonment amended from 180 Months to One Hundred Twenty (120) Months to be served concurrently with Counts 2 & 3. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment. Count: 2. One Hundred Twenty (120) Months Imprisonment, to be served concurrently with Counts 1 & 3. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment. Count 3: One Twenty (120) Months Imprisonment, to be served concurrently with Counts 1 & 2. Three (3) Years Supervised Release, to run concurrently. $100.00 Special Assessment. Count 4: Sixty (60) Months Imprisonment to be served consecutively with Counts 1, 2 & 3.

Five (5) Supervised Release, to run concurrently. $100.00 Special Assessment. (Signed by Judge Raymond A. Jackson on 4/22/05) & filed on 4/22/05. Copies dist. (popo) (Entered: 04/25/2005)

* * *

05/12/2005 39 NOTICE OF APPEAL – Final Judgment by USA as to Derrick Kimbrough re [35] Amended Judgment. (ptom,) (Entered: 05/18/2005)

* * *

05/11/2006 53 Opinion of USCA vacating the sentencing and remanding to the District Court for resentencing, by unpublished per curiam, as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. Filed in USCA on 5/9/06. (05-4554) (ptom,) (Entered: 05/16/2006)

05/25/2006 54 USCA NOTICE as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. The mandate in this case will not issue at the scheduled time because a timely petition for rehearing has been filed. (05-4554) (ptom,) (Entered: 06/02/2006)

06/08/2006 55 ORDER of USCA denying appellee's petition for reharing [*sic*] en banc as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. (05-4554) (ptom,) (Entered: 06/09/2006)

06/15/2006 56 JUDGMENT of USCA (certified copy) vacating the sentence and remanding to the District Court for resentencing as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. The mandate

		issued in the USCA on 6/14/06. (05-4554) (ptom,) (Entered: 06/20/2006)
06/18/2007	57	TRANSCRIPT of Proceedings (Guilty Plea Hearing) as to Derrick Kimbrough held on January 11, 2005 before Judge Judge [*sic*] Raymond A. Jackson. Court Reporter: Sharon Borden, OCR. (ldab,) (Entered: 06/18/2007)

* * *

GENERAL DOCKET
US Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 05-4554

5/26/05	Criminal case docketed. (jhm)
	* * *
8/8/05	Brief and joint appendix filed by Appellant US. Copies of brf: 8 Sealed portion?[Y/N]: y # Brf pages: 25 # Apx Copies(include vol #'s): 6 of Vol. 1 # Sealed copies: 4 of Vol. 2 # Apx pages: 113 2-sided copying?[Y/N]: y Sufficient?[Y/N]: y Method of filing w/ court: PM Date of Service on parties: 8/8/05 Type of service on parties: PM [05-4554] ~ [4234522] Appellee brief due 9/1/05 for Derrick Kimbrough. (jhm)
	* * *
8/10/05	ORDER FILED [4234619] granting certificate to pl port of apx under seal [4234618-1] [05-4554] Copies to all parties. ~ [4234619] [05-4554] (jhm)
	* * *
9/15/05	Brief filed by Appellee Derrick Kimbrough. Copies of brief: 8 # brf pages: 50. Sufficient[Y/N]?: y. SEALED?[Y/N]: n. Method of filing w/ court: PM Date of Service on parties: 9/15/05 Type of service on parties: PM [05-4554] ~ [4256164] (jhm)
10/3/05	Reply brief filed by Appellant US. Copies of brief: 8 # brf pages: 19. Sufficient[Y/N]?: y. SEALED[Y/N]?: n. Method of filing w/ court: PM Date of Service on parties: 10/3/05 Type of service on parties: PM [05-4554] ~ [4266011] (jhm)

10/5/05	Case calendared for oral argument. Case calendared for oral argument on: 12/2/05. [05-4554] - [4266061] (jc)
11/14/05	Case removed from calendar. Counsel called?[Y/N]: y. [05-4554] (jc)

* * *

5/9/06	Unpublished per curiam opinion filed. Copies to all parties. [05-4554] (jhm)
5/9/06	Judgment order filed. Decision: Vacated and remanded. EOD Date: 5/9/06. - [4389006] [05-4554] (jhm)
5/23/06	Petition filed by Appellee Derrick Kimbrough for rehearing en banc. Number of copies filed: 20 [4398089-1] - [4398089] [05-4554] (jhm)
6/6/06	COURT ORDER filed [4405391] denying motion for rehearing en banc [4398089-1] EOD Date: 6/6/06. Copies to all parties - [4405391] [05-4554] (jhm)
6/14/06	Mandate issued. - [4409929] [05-4554] (jhm)
9/12/06	Supreme Court notice that petition for certiorari was filed on 09/05/06. Spct No.: 06-6330 Spct Pty 1: Derrick Kimbrough Spct Pty 2: United States. [05-4554] - [4459137] (mst)
6/19/07	Supreme Court order received granting petition certiorari [4459137-1] on 06/11/07. [05-4554] - [4600734] (dhb)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA v. JOEL RENATO FLOWERS (Counts 1-5) DERRICK KIMBROUGH (Counts 1-4)	) CRIMINAL NO. 2:04CR)) 21 U.S.C. § 846) Conspiracy to Distribute) and Possess with) Intent to Distribute) Cocaine and Cocaine Base) (Count 1))) 21 U.S.C. § 841(a)(1)) Possession with Intent to) Distribute Cocaine and) Cocaine Base) (Counts 2 and 3))) 18 U.S.C. § 924(c)(1)) Possess Firearm in) Furtherance of a Drug) Trafficking Crime) (Count 4))) 18 U.S.C. § 922(g)(1)) Possess a Firearm as a) Convicted Felon) (Count 5))) 18 U.S.C. § 853) Criminal Forfeiture)

INDICTMENT

(Filed Sep. 13, 2004)

September, 2004 Term – at Norfolk, Virginia

COUNT ONE

THE GRAND JURY CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, in the Eastern District of Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH defendants herein, did unlawfully, knowingly and intentionally combine, conspire, confederate and agree with other persons both known and unknown to the grand jury, to commit the following offenses against the United States:

1. to unlawfully, knowingly and intentionally possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack" cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(iii).

2. to unlawfully, knowingly and intentionally distribute approximately 50 grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack" cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(iii).

3. to unlawfully, knowingly and intentionally possess with intent to distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C).

4. to unlawfully, knowingly and intentionally distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II narcotic

controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C).

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the defendants committed at least one of the following overt acts, among others, in the Eastern District of Virginia:

1. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess approximately 56 grams of "crack" cocaine for further distribution.

2. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess approximately 92.1 grams of cocaine for further distribution.

3. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess a firearm while possessing approximately 56 grams of "crack" cocaine and 92.1 grams of cocaine for further distribution.

4. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess digital scales and packaging material.

5. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess $15,103.00 U.S. Currency, representing drug proceeds.

(All in violation of Title 21, United States Code, Section 846)

COUNT TWO

THE GRAND JURY FU[R]THER CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, within the Eastern District of Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, defendants herein, did unlawfully, knowingly and intentionally possess with intent to distribute approximately 56 grams of cocaine base, commonly known as "crack" cocaine, a Schedule II narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(iii) and Title 18, United States Code, Section 2)

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, within the Eastern District of Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, defendants herein, did unlawfully, knowingly and intentionally possess with intent to distribute approximately 92.1 grams of cocaine, a Schedule II narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C) and Title 18, United States Code, Section 2)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 24, 2004 in Norfolk, Virginia, in the Eastern District of Virginia, JOEL RENATO FLOWERS

and DERRICK KIMBROUGH, did unlawfully and knowingly possess a firearm in furtherance of a drug trafficking crime, referenced in Counts One through Three of this indictment and incorporated herein, for which they may be prosecuted in a court of the United States.

(In violation of Title 18, United States Code, Section 924(c)(1) and Title 18, United States Code, Section 2)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, in the Eastern District of Virginia, JOEL RENATO FLOWERS, having been previously convicted of a felony crime punishable by imprisonment for a term exceeding one year, did unlawfully and knowingly possess in and affecting commerce a firearm which had been shipped and transported in interstate and foreign commerce.

(In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2))

CRIMINAL FORFEITURE

THE GRAND JURY FURTHER CHARGES THAT:

A. The following defendants, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, if convicted of any violation alleged in Counts One through Three of this indictment, shall forfeit to the United States:

1. Any and all property constituting, or derived from, any proceeds the defendant obtained, directly or indirectly, as the result of such violations; and

2. Any of the defendant's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violations.

(All in violation of Title 21, United States Code, Section 853)

B. The property subject to forfeiture under paragraph A, above, includes but is not limited to the following:

1. The sum of approximately $15,103, in the aggregate, representing the gross proceeds constituting, involved in, derived from, or traceable to the foregoing offenses that were seized in Norfolk, Virginia on May 24, 2004.

C. If any property that is subject to forfeiture, (a) cannot be located upon the exercise of due diligence, (b) has been transferred to, sold to, or deposited with a third person, (c) has been placed beyond the jurisdiction of the Court, (d) has been substantially diminished in value, or (e) has been commingled with other property that cannot be subdivided without difficulty; it is the intent of the United States to seek forfeiture of any other property of the defendant, up to the value described above, as subject to forfeiture under Title 21, United States Code, Section 853(p).

A TRUE BILL:

[signature redacted]
FOREPERSON

PAUL J. McNULTY
UNITED STATES ATTORNEY

By: /s/ W D Muhr

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Assistant United States
Attorney
8000 World Trade Center
Norfolk, Virginia 23510
(757) 441-6331

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
V.	)	
	)	NO. 2:04cr185
DERRICK KIMBROUGH,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

January 11, 2005

(Guilty Plea Hearing)

Before: THE HONORABLE RAYMOND A. JACKSON
United States District Judge

Appearances:

WILLIAM D. MUHR, ESQUIRE
Assistant United States Attorney
Counsel for the United States

OFFICE OF THE FEDERAL PUBLIC DEFENDER
By: RILEY ROSS, ESQUIRE
Counsel for the Defendant

The defendant appearing in person.

Also Present:

Edward J. Allen, Probation Officer

[2] THE DEPUTY CLERK: Case No. 2:04cr185, United States of America versus Derrick Kimbrough.

Mr. Muhr, is the government ready to proceed?

MR. MUHR: The government is ready, Your Honor.

THE DEPUTY CLERK: Mr. Ross, is the defendant ready to proceed?

MR. ROSS: The defendant is ready, Your Honor.

THE COURT: All right. Good afternoon, ladies and gentlemen.

Mr. Ross, if you could come to the podium with Mr. Kimbrough, please.

Mr. Kimbrough, if you could take an oath, please.

(The defendant was sworn by the deputy clerk.)

DERRICK KIMBROUGH, having been first duly sworn, was examined and testified as follows:

EXAMINATION

THE COURT: All right. Mr. Kimbrough, you have taken an oath to tell the truth. If you answer any of the Court's questions falsely, your answers may later be used against you in a prosecution for perjury or making a false statement. Do you understand this, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Will you state your full name for the record, please.

THE DEFENDANT: Derrick Kimbrough.

[3] THE COURT: And how old are you, sir?

THE DEFENDANT: Thirty-six, sir.

THE COURT: And how much formal education have you been provided?

THE DEFENDANT: Twelve years.

THE COURT: Have you been recently hospitalized for any type of mental illness or addiction to drugs of any kind?

THE DEFENDANT: No, sir.

THE COURT: Are you currently under the influence of any medication, narcotic, or any substance that hinders your memory?

THE DEFENDANT: No, sir.

THE COURT: The record reflects that you are here with Mr. Ross from the Federal Public Defender's Office. Have you had an opportunity to fully discuss the charges with him?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with the advice and counsel that he offers?

THE DEFENDANT: No, sir.

THE COURT: Well, I ask you that question in regard if you have some differences with some of the advice he's given you?

THE DEFENDANT: Oh, no, sir.

THE COURT: Oh! Well, my question was, are you fully satisfied with the advice he's given you regarding the case?

[4] THE DEFENDANT: I'm sorry. I'm fully aware of what the advice is, but I'm not satisfied.

THE COURT: Okay. Well, I will continue to go on with the plea.

Now, do you have a copy of the indictment pending against you?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone in any way threatened you to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: So this is your decision to plead; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, are you pleading guilty pursuant to a plea agreement or without a plea agreement?

Is this a plea agreement? Is this plea with a plea agreement or without a plea agreement?

MR. ROSS: It is my understanding, Your Honor, that my client wishes to plead without a plea agreement. That would be against my advice, which I believe is what he referred to with regard to satisfaction, but he would like to plead without a plea agreement and plead guilty to the four charges against [5] him in the indictment.

THE COURT: All right. Is that your position, Mr. Kimbrough?

THE DEFENDANT: Yes, sir.

THE COURT: Of course, you understand that Mr. Ross is schooled in the law and does this everyday?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, let's turn to the charges, then.

Do you require the Court, Mr. Kimbrough, to read each and every charge again, or do you understand each charge?

THE DEFENDANT: I understand each charge.

THE COURT: Okay. So you understand that in count one of the indictment you are charged with conspiracy?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. On this conspiracy charge, Mr. Kimbrough, this is a Class A felony. It carries a mandatory minimum prison term of ten years, a maximum imprisonment term of life, a fine of four million dollars, supervised release of five years, and a special assessment, that is, you have to pay a hundred dollars on each count upon which the Court receives or takes a guilty plea. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Now, when I referred to a period of [6] supervised release, the period of supervised release

always commences or starts after your term of imprisonment has ended.

On count one, the term of supervised release is five years. If you are placed on supervised release, you will be given certain standards and conditions to meet while you are under the supervision of the Court. If you violate those standards and conditions, the Court has the discretion to revoke your period of supervised release and return you to prison for the full term you would have been on supervised release. Here that's five years. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, let's turn to the next count, count two, which charges you with possession with intent to distribute cocaine base on or about the 24th of May, 2004. This offense is also a Class A felony, Mr. Kimbrough.

You are pleading to count two, right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. It's a Class A offense. It has a mandatory minimum imprisonment term of ten years, a maximum term of life. It has identical punishment as the Court provided or gave you on the first count, on the conspiracy count. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: The same thing I told you about the conspiracy count applies to count two.

[7] Now, you have a five-year period of supervised release there, but the periods of supervised release would run concurrently. In other words, they would run at the

same time. So while you might be out of prison on, let's say, all four charges, the period of supervised release would all run concurrently, at the same time. Okay?

THE DEFENDANT: Um-hum.

THE COURT: Now, count three –

Wait a minute. What was count two again? Let's go back here to be sure we are straight.

Count two charged you with possession with intent to distribute cocaine base, so the penalty there was much harsher than count three in which you are charged with possession with intent to distribute straight cocaine. That charge carries a maximum imprisonment term of 20 years, a fine of $1,000,000, a minimum supervised release term of three years, and again, a $100 special assessment. But again, the period of supervised release, though it's three years, would run concurrently or at the same time the period of supervised release runs on count one and count two. But do you see the distinction in terms of the punishment? Crack cocaine carries a stiffer penalty than straight cocaine does.

Now, let's turn to count four, which charges you with possession of a firearm in furtherance of a drug-trafficking crime. This is also a Class A felony, that is, count four. [8] The minimum sentence is five years. The maximum is life. The maximum fine is $250,000. And, again, the period of supervised release is five years, and, of course, there's a $100 special assessment. That's the punishment that you would be exposed to on count four.

In all likelihood if you are sentenced on all of these counts, the Court runs the time concurrently. Most of the

times it runs concurrently, that is, at the same time. It's not end to end; it's concurrent.

Now, each of these offenses, Mr. Kimbrough, is a felony offense, and you see that because they carry more than a year in jail. Each is a felony offense. Have you ever been convicted of a felony before?

THE DEFENDANT: No, I haven't.

THE COURT: You have not?

THE DEFENDANT: No.

THE COURT: If the Court accepts your plea to each of these charges, or any one of them, each offense is a felony offense and if you are convicted of a felony offense in the Commonwealth of Virginia, you are deprived of certain civil rights. Among them would be your right to vote, your right to possess a firearm, your right to seek public office, if you ever decided you wanted to run for some public office at some time in the future, your right to be a notary. Those are some of the rights you would lose if you become a convicted felon, [9] and the only way you would get your rights restored is to finish all of your time, all of your supervised release, and then to petition the Commonwealth of Virginia to restore your rights as a citizen. That's a very long and cumbersome process. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Now, have you talked to Mr. Ross about how the sentencing guidelines might affect you?

THE DEFENDANT: Yes, sir.

THE COURT: So you understand we need a presentence report –

THE DEFENDANT: Yes, sir.

THE COURT: – to arrive at the sentencing guideline for each one of these sentences?

Once we get the report, you and Mr. Ross will have the opportunity to check the accuracy of that report, that is, whether the guidelines are applied correctly and the facts in the report. The United States attorney will have the same opportunity. Then we will come back to Court, and the Court will resolve any objections the parties have in order to arrive at the applicable sentencing guidelines.

Now, once we arrive at a sentencing guideline, the law provides the Court with an opportunity under some circumstances to depart from the guideline, that is, to not follow it. If the Court departs from the guideline, it means I [10] can give you a lower sentence, if the Court departs downward from the guidelines. In other words, I'm giving you a lesser penalty. If the Court decides that no, I'm going to depart upward, then the Court will give you a stiffer sentence than what the guidelines suggest.

The Court doesn't know that that's going to happen in your case, but it's not an unusual thing for the Court to depart from the guidelines. Do you understand what I'm saying?

THE DEFENDANT: Yes, sir.

THE COURT: The Court will also, Mr. Kimbrough, have to look at all provisions of the guidelines that might apply to you. That means from time to time we have what we refer to as enhancements. There is certain conduct you

can engage in when you commit the offense that will cause your punishment to be a little bit stiffer. So any enhancements that apply will be considered in the case.

The Court would look at what is referred to as relevant conduct, in other words, everything you have done regarding these offenses. The Court can even look at uncharged misconduct. In other words, if you distributed some more drugs someplace or had some more drug weight someplace, the Court can consider those drugs or the weight of those drugs in deciding what your offense level should be or how stiff the punishment would be, even though you haven't plead guilty to those instances of having drugs. So that's an example of the Court [11] being able to look at what we refer to as relevant conduct.

In other words, the Court will look at any conduct in which you encouraged, aided, abetted or participated in this offense, or any criminal conduct that you should have reasonably anticipated while you were involved in committing these offenses. So you should be aware that other things may come up other than just the four charges you are pleading guilty to. Do you understand what I'm telling you?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

Now, are you aware, Mr. Kimbrough, that there is no parole in federal prison?

THE DEFENDANT: Yes, sir.

THE COURT: You get approximately 52 days off good time as a prisoner, but other than that, you are

expected to serve all the time you are sentenced to if you go to federal prison.

Do you understand you have a right to plead not guilty to each of these charges and to persist in your not guilty plea and go right on to trial on Thursday?

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you go to trial, you have a right to be tried by jury, a right to be defended by Mr. Ross. If you could not afford to bring witnesses to trial, the Court would [12] pay the cost for you to subpoena witnesses to trial. You would have the right to cross-examine and confront each witness at trial through your counsel.

You would have the right on your part to remain silent, if you chose to do so. If you chose not to testify, the U. S. attorney would not be able to comment on your silence to the jury in order to get you convicted. You have a constitutional right to remain silent.

As I indicated, the government has to prove your guilt beyond a reasonable doubt because you would walk into the trial with a presumption of innocence. That presumption of innocence would remain with you throughout the trial unless the government could prove your guilt beyond a reasonable doubt on these charges.

Now, Mr. Kimbrough, if you persist in this plea and the Court accepts your plea to each of these charges, you would have waived or given up all these rights associated with a trial that the Court has just outlined. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Now, have you talked thoroughly with Mr. Ross about waiving your rights to go to trial – the rights you would have at trial?

Do you understand my question? Have you discussed with Mr. Ross the matter of waiving your right to go to trial [13] and entering this plea? Have you thoroughly discussed this?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand your right to go to trial?

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to give up these rights and enter a plea to these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I want you to understand this. It's not unusual for defendants to come back after they have been convicted and blame the lawyer for all kinds of things they didn't understand, and what will happen is what you tell me here today on this record will be used to rebut those arguments. So it's up to you whether you enter a plea or not. It's not up to the lawyer; it's up to you. It's your decision. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, when you go to trial, Mr. Kimbrough, the government has to prove your guilt beyond a reasonable doubt by proving certain critical elements of the crime or facts on each crime in order to

prevail, and I'm going through what they would have to prove on each one of these four counts.

On the conspiracy count, first of all, let me tell you that conspiracy is a fancy term probably to you, but it's [14] nothing more than an agreement between two people or more to commit a crime or do something that the law prohibits. Here the alleged conspiracy was to engage in the distribution and possession of drugs, the cocaine and crack cocaine, and the conspiracy was allegedly between you and your codefendant in this case.

Now, the government would first have to prove that there was a conspiracy between two or more persons as described in this indictment. That's the first thing they have to show.

Secondly, they would have to show that at some time during the life of this conspiracy, this agreement to violate the law by distributing and trafficking in drugs, you, knowing the purpose of that conspiracy, voluntarily became a member of it, participated in it. That's all they have to show: the existence of the conspiracy and your voluntary membership in the conspiracy once you knew the purpose of it.

If they can prove those two critical facts beyond a reasonable doubt, it would be sufficient for a jury to convict you of conspiracy to unlawfully, knowingly and intentionally possess with intent to distribute cocaine base and cocaine as set forth in this indictment.

Now, any questions about the first charge?

THE DEFENDANT: No, Your Honor.

THE COURT: On the second charge where you are charged in count two with possession with intent to distribute [15] cocaine base, the government would have to prove three critical elements: First, that you possessed cocaine base;

Second, that you knew this was cocaine base; and

Thirdly, that you intended to distribute the substance. That's all they have to prove.

On count three where you are charged with possession with intent to distribute cocaine, the government likewise has to prove that you possessed cocaine;

Secondly, that you knew it was cocaine; and

Thirdly, that you intended to distribute this cocaine. They have to prove those three elements beyond a reasonable doubt.

Finally, with respect to count four where you are charged with the knowing and unlawful possession of a firearm in furtherance of a drug-trafficking crime, the government has to prove, first of all, that you possessed a firearm;

Secondly, that you possessed that firearm during and in relationship to a drug-trafficking crime – no, I'm sorry, that you possessed the firearm in furtherance of a drug-trafficking crime. The drug-trafficking crime they are referring to here is the possession with intent to distribute cocaine, the possession with intent to distribute cocaine base, and conspiracy. Those are the three charges.

And finally, on count four they would have to prove that the crime for which you possessed this firearm, that

is, [16] the drug-trafficking crime, is one that could be prosecuted in a court of the United States. And clearly those three charges in counts one, two and three are offenses that can be prosecuted in a court of the United States. So those are the things that they would have to prove on count four.

Now, do you have any questions about what the government has to prove?

THE DEFENDANT: No, sir.

THE COURT: The Court needs to determine whether there's a factual basis for this plea. Is there any written agreement, or proffer, or anything of that nature?

MR. MUHR: Your Honor, I do have a written agreement here, but I'm not certain he's willing to sign this one.

MR. ROSS: Your Honor, the written agreement that we have now, actually it would support two of the charges, the possession with intent to distribute cocaine and possession with intent to distribute cocaine base, and they were actually drafted pursuant to the plea agreement which covered those two charges. The facts would need to be – we would need to add facts to support a guilty plea to the third count.

THE COURT: Let me ask you. Has he signed it?

MR. ROSS: He has not, Your Honor, only because we were not sure on how the Court would want to proceed, and we have not signed it.

THE COURT: Okay. Then here's the situation. The [17] Court will have to find out whether there's a factual basis from the United States.

You will have to stand up and make a proffer, then, Mr. Muhr.

MR. MUHR: Yes, sir, I will, Your Honor.

THE COURT: All right. You may have a seat while he makes a proffer.

MR. MUHR: Your Honor, this is a case that, obviously, the Court is actually probably somewhat familiar with, or actually probably very familiar with the facts seeing that there was a suppression hearing on this.

On this particular case, Your Honor, I would just go over the facts that were presented at that suppression hearing.

Your Honor, on May 24th around 10:45 p.m., the Norfolk Police Officers Ball and Rutherford, they were patrolling the 700 block of Lexington Street in Norfolk. This is a well-known, high drug-trafficking area.

The officers, they observed a parked station wagon and that there was a male crouched outside of this wagon. When the male, what appeared to them, when the male saw them, he quickly took off running into an apartment complex.

The officers took their car and went over to try to figure out where this male went, could not, and came back to the car. In the car was the defendant, who was in the driver's [18] seat, along with his codefendant, Flowers. They inquired of Mr. Flowers and Mr. Kimbrough if they

knew why the male took off running? Both of them stated they did not know.

The police observed in Mr. Kimbrough's lap a large amount of cash, which was later counted and was $125. It was just sprawled out on his lap.

One of the officers was on one side watching Mr. Kimbrough, and the other was on the other side watching Mr. Flowers. Officer Rutherford, he was on the side watching Mr. Flowers, and he noticed Mr. Flowers making a furtive movement with this like maroon-colored leather bag. At the time he didn't know what he had, but he was making this type of movement, moving to the side of him. Based on the circumstances so far, they were concerned for their safety and so they asked if they would step out of the car, and both of them did comply and did step out of the car.

As they stepped out of the car, the officer noticed immediately the maroon bag in the area where Mr. Flowers was making those furtive movements. He took the bag, and as he opened the bag, immediately he could see in there a very large amount of cash and a very large amount of drugs that was [*sic*] in the bag.

He didn't say anything to them. He opened it, looked, and then started to step out, and as soon as he did, both of them took off in opposite directions from each other. [19] They went after these individuals, catching them not too far from where they went.

As they were running, Mr. Flowers, he took out a gun, and he ended up tripping and the gun ended up flying out of his hands. It fell on the sidewalk. The clip came out, and the bullets scattered about on this.

Inside that leather bag, there was a very large amount of money and a very large amount of crack cocaine that was in that bag. In addition, there was an automobile receipt in the name of Joel Flowers that was in that bag along with an NADA book.

In the console area, they found also a large amount of drugs that was in the console area. That included both powder and crack cocaine. In addition, there was a large bag on the floor, which itself contained a very large amount of cash. It was a black plastic bag sitting on the floor that contained a large amount. The total amount of cash in this was about $15,100 in cash that was in the car. The total amount of drugs on this – of the cocaine, it was 92.1 grams, and of the crack cocaine it was approximately 56 grams.

Mr. Kimbrough was searched afterwards and as he was searched, on him was electronic scales in addition to $1,823. He also had a loaded .380 magazine on him, a razor blade in a film canister that was filled with a bunch of empty baggies, and he had a cell phone.

[20] Mr. Flowers, he was also searched, and on him was $1,655. Also contained within the drugs, too, there was a set of baggies that was in the drugs that were not yet used that was contained within the compartment of the drugs.

All the drugs were analyzed and sent to the lab, with the results that I had stated earlier. The intent to distribute on this would have been, based on expert testimony, based on the drug quantity and the presence of the large amount of cash, electronic scales, guns, empty baggies, razor blades and just the circumstances alone being in a high drug-trafficking area. And the gun in question was

not manufactured in Virginia; and, therefore, it did cross over state lines. I know that doesn't affect Mr. Kimbrough, but that affects Mr. Flowers.

Both of them gave a statement, but neither of them at the time admitted up to any of the drugs and said they didn't run. But Mr. Flowers did say that the NADA book was his, along with some paperwork that he had that was his.

Your Honor, that's the gist of the argument and the facts in this case.

THE COURT: All right. I thank you.

Would you return to the podium, Mr. Kimbrough.

All right. Mr. Kimbrough, the government has given a summary of what evidence they believe would be adduced to establish your guilt if you went to trial.

[21] Mr. Ross, does Mr. Kimbrough have a meritorious defense to either of these counts?

MR. ROSS: I don't believe so, Your Honor. But he would disagree with several of the facts as stated by the government and at least not admit those, but he would agree that there's enough information – or he would, if the Court needs, offer information to support his guilty pleas. I do not think he has a defense to these charges, but I would like to go on record stating that he does not agree with the proffer made by the government on several factors.

THE COURT: Well, I don't know that it requires that he agree with it, but he disagrees with some of the proffer?

MR. ROSS: Exactly, Your Honor, but not to the extent that it would jeopardize his guilty plea.

THE COURT: Okay. I don't know whether he disagrees with some essential element. Does he disagree with any essential element?

MR. ROSS: He does not, Your Honor. I could go count by count, if the Court would like.

THE COURT: No, as long as he doesn't disagree with an essential element. He can disagree with some other things, so long as he doesn't disagree with an essential element.

MR. ROSS: I would say, Your Honor, just for the record, with regards to count one, the conspiracy count, Mr. Kimbrough does admit that he conspired with others [22] regarding the underlying drug activity. However, that is not an admission that he conspired with Mr. Flowers.

THE COURT: Okay. That's fine.

Mr. Kimbrough, how do you plead to count one of the indictment?

THE DEFENDANT: Count one?

THE COURT: Conspiracy.

MR. ROSS: Your Honor, if I could, before we go through these, I would also like to point out something with regards to count four, and I bring this to the Court's attention and I would like to, again, go on record saying these pleas that Mr. Kimbrough are about to enter are against my advice.

From what I understand, there's going to be, after this guilty plea session concludes, an opportunity for Mr. Kimbrough possibly to testify later in Mr. Flowers' trial. For that reason, Your Honor, I just wanted to make the record clear here, because this record may become a substantial piece of evidence with regards to any later testimony he may give. As I stated, with regards to the conspiracy count, he is not making any admission he conspired with Mr. Flowers.

Additionally, with regards to the firearm, count four, the 924(c) count, if called to testify, it's my understanding that Mr. Flowers would represent that he was in possession of a firearm that evening, of the firearm in [23] question.

I wanted to bring that out on the record, Your Honor. In the case of any further testimony that may come from Mr. Kimbrough, this proceeding here may be called into evidence, and what he said and did not say may impact on him in some way.

THE COURT: Are you saying he would say he was in possession of the firearm in count four, or he was not?

MR. ROSS: Your Honor, if the Court would put it to him. But from my understanding, he would indicate that he was in possession.

THE COURT: Okay. If he was in possession of it, then I don't see what the problem would be here.

MR. ROSS: Thank you, Your Honor.

THE COURT: All right. Mr. Kimbrough, how do you plead to count one, which charges you with conspiracy?

Mr. Kimbrough?

THE DEFENDANT: Yes, sir.

THE COURT: How do you plead to count one, which charges you with conspiracy?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: How do you plead to count two, which charges you with possession with intent to distribute 56 grams of cocaine base on or about May 24th, 2004?

THE DEFENDANT: Guilty.

[24] THE COURT: How do you plead to count three, which charges you with possession with intent to distribute 92.1 grams of cocaine on or about May 24th, 2004?

THE DEFENDANT: Guilty.

THE COURT: And finally, how do you plead to count four, which charges you with unlawful and knowing possession of a firearm in furtherance of a drug-trafficking crime on the same day of May 24th, 2004?

THE DEFENDANT: Guilty.

THE COURT: It is the finding of the Court in the case of United States of America versus Derrick Kimbrough that the defendant is fully competent and capable of entering an informed plea, the defendant is aware of the nature of the charges and the consequences of his plea to each of the four charges in the indictment, that

the defendant's plea to each of the counts, one, two, three and four, is a knowing and voluntary plea supported by an independent basis in fact, containing the essential elements of the offense.

That being the case, your plea is accepted, Mr. Kimbrough, and you are hereby adjudged guilty of counts one, two, three and four of the indictment.

It will be necessary to schedule you for a disposition in this case. The Court's looking at a deposition date and time of around 11:30 on the 11th, Mr. Ross and Mr. Muhr.

[25] MR. MUHR: Which date, Your Honor?

THE COURT: 11:30 a.m. on 11 April.

MR. ROSS: That's fine with the defense, Your Honor.

MR. MUHR: I can do that, Your Honor.

THE COURT: All right. Fine.

I'm sending a sentencing procedures order out.

All right. Mr. Ross, are there any other matters to come before the Court?

MR. ROSS: No, Your Honor. Thank you.

THE COURT: Mr. Muhr?

MR. MUHR: No, Your Honor.

THE COURT: All right. Then the Court will be in recess until further notice.

(This hearing concluded at 3:10 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

X Sharon B. Borden X
Sharon B. Borden, RMR, FCRR

X June 18, 2007 X
Date

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,	)	
v.	)	CRIMINAL NO. 2:04cr185
DERRICK KIMBROUGH	)	

POSITION OF THE UNITED STATES
WITH RESPECT TO SENTENCING FACTORS

(Filed Mar. 10, [illegible])

Upon review of the Presentence Investigation Report, the United States has no objections to and does not dispute any facts or factors material to sentencing in the presentence report.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: W D Muhr
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CERTIFICATE OF SERVICE

I certify that on March 10, 2005, a true and correct copy of the "POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING FACTORS" was delivered to

Sean C. Mitchell, the probation officer handling this case, and mailed to the following counsel for the defendant:

Riley H. Ross, Esquire
150 Boush Street, Suite 403
Norfolk, VA 23510

/s/ W D Muhr
William D. Muhr
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,	)	
v.	)	CRIMINAL NO. 2:04cr185
DERRICK KIMBROUGH	)	

GOVERNMENT'S RESPONSE TO
DEFENDANT'S SENTENCING POSITION

(Filed Mar. 30, [illegible])

The United States of America, by and through its attorney, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, and William D. Muhr, Assistant United States Attorney, comes in response to defendant's sentencing position. Defendant opposes Paragraphs 18-21 of the Presentence Report wherein he is assessed a two-point enhancement for obstruction of justice pursuant to Section 3C1.1 of the U.S.S.G. and denied a two-point reduction for acceptance of responsibility pursuant to Section 3E1.1. The factual basis for the enhancement for obstruction of justice and the denial for acceptance of responsibility are both based on the defendant's testimony at the trial of co-defendant Joel Flowers. At the trial the defendant testified in sum that he was guilty of all the charged offenses because all the incriminating evidence belonged to him while Flower[s] was innocent of all the charged offenses because none of the incriminating evidence belonged to him nor was he aware of its presence. It is the government's position that the defendant committed perjury during the course of his testimony therefore he is

properly assessed a two-point enhancement for obstruction of justice and properly denied a two-point reduction for acceptance of responsibility.

Section 3C1.1 authorizes a two-point enhancement for obstructing or impeding the administration of justice or attempting to do so. The obstruction can occur during any stage of a case including the investigation, the actual prosecution or the sentencing. Commentary #4(b) lists the committing, suborning, or attempting to suborn perjury as an example of conduct that merits an enhancement for obstruction of justice. In *United States v. Dunnigan,* 507 U.S. 87 (1993), the Supreme Court defines perjury as "false testimony concerning a material matter with the willful intent to provide false testimony." Id. at 87. It is the government's position that defendant did falsely testify to a material matter with the intent to do so and therefore committed perjury.

In the instant case, the facts of the case and the physical evidence clearly pointed to the culpability of Joel Flowers which was verified by the jury's verdict. However the defendant in a deliberate and calculated manner attempted to convince the jury that Flowers was merely a victim of his circumstances and was not culpable. In his attempt to exonerate Flowers he systematically attempted to explain away every fact or detail that pointed to Flowers' culpability. He told the jury that he did not know the unknown man who was standing by his automobile and who fled when the police arrived and that no drug transaction occurred between them even though defendant was found with $125 of U.S. currency sprawled on his lap, the price of an 8-ball. He told the jury that Flowers did not make any furtive movements attempting to hide the maroon bag that contained a large amount of cocaine,

$5000, paperwork in Flowers' name and an NADA book that Flowers admitted belonged to him. He told the jury that he, not Flowers, put the NADA book and the paperwork in Flowers' name in the maroon bag for safekeeping because Flowers had accidently left them in the automobile earlier that day. He told the jury that Flowers was completely unaware of the drugs and money in the maroon bag; completely unaware of the $6500 in a plastic bag located at his feet; completely unaware of the additional large amount of U.S. currency and drugs, plus scales and packaging material found elsewhere in the automobile. He told the jury that Flowers did not take off running as a result of the police discovering the contents of the maroon bag without communicating to Flowers the results of their discovery. He told the jury that Flowers never possessed or knew about the handgun and the police did not recover the gun as a result of a foot pursuit of Flowers wherein Flowers threw it to the ground. In his attempt to explain away the gun, defendant stated on direct examination that he possessed the gun and while he and Flowers were walking across the grass to get to his car he felt the gun slip out of the holster as a result of a rip in the holster from a botched sewing job he had done on the holster earlier. The defendant even pointed to the exact spot where the gun slipped out on an overhead map and stated that it made a noise when it hit the ground. The holster was introduced into evidence by the government and clearly does not have any rips and the stitching is clearly the original machine stitching from the manufacturer. On cross-examination when the defendant was asked why he did not pick the gun up, he changed his story and said he was unaware that the gun slipped out of the holster while he was crossing the grass, but discovered it missing when an unknown individual stood at his car door and he attempted to pull

out the gun for protection. Clearly, there is ample evidence that defendant intentionally gave false testimony to the jury on material facts for the purpose of exonerating Flowers and therefore is rightly attributed with a two-point enhancement for obstruction of justice.

Commentary #4 of Section 3E1.1 states that a defendant who receives an enhancement for obstruction of justice ordinarily indicates that he has not accepted responsibility and therefore is not entitled to a reduction. The defendant claims that even if he is given a[n] enhancement for obstruction of justice that he is still entitled to acceptance of responsibility because his case fits into the extraordinary exception. The defendant argues that he pled guilty to all counts of the indictment, but could have avoided doing so if he had taken advantage of the offered plea agreement which required him to plead guilty to only the conspiracy count and therefore he accepted responsibility to counts in the indictment beyond what was required of him in the plea agreement. Therefore, even if he did obstruct justice he accepted responsibility beyond what was required of him in the plea agreement making this an extraordinary case and thus entitles him to a two-point reduction for acceptance of responsibility.

The defendant's argument attempts to view the acceptance of responsibility and the obstruction of justice as two separate and unrelated events and if he accepts responsibility to counts that he could have avoided in a plea agreement that this makes it an extraordinary case and entitles him to receive acceptance of responsibility even if he did obstruct justice. It would seem that an example of an extraordinary case that would entitle a defendant to acceptance of responsibility even though he receives an enhancement for obstruction of justice is one

wherein the defendant makes a good faith effort to amend for his previous acts for obstruction of justice. A possible example would be a defendant who impeded justice at the investigation stage that merited an obstruction of justice enhancement, but later pleads guilty and testifies truthfully against his co-defendants at trial. The defendant has taken no action to make amends for his obstruction of justice and his conduct indicates that he has not accepted responsibility. He has clearly denied relevant conduct which includes his involvement with Flowers in a drug conspiracy and Flowers' involvement in the conspiracy.

A Fourth Circuit case almost on point is *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995). That case involved two defendants named Murray and Johnson who were both indicted for four bank robberies. Johnson, in a written confession admitted to her role in the bank robberies and that of her co-defendant Murray. Murray in an oral confession admitted to his role in the bank robberies. Johnson then entered a guilty plea to the robberies, while Murray insisted on a trial. At the trial Johnson testified that she could not remember making any statements in a written confession to the police that Murray was involved in the robberies because her memory was impaired from drug use. She also denied her signature on her written confession. The Fourth Circuit affirmed the District Court's ruling to enhance Johnson for obstruction of justice because the court found that Johnson deliberately committed perjury during her testimony at trial and her excuse of possessing a faulty memory because of drug use was not credible. Clearly in the instant case the perjurious testimony of the defendant was even more egregious than that of defendant Johnson. Defendant Johnson simply denied any memory of her earlier confession of the involvement of

Murray, while in the instant case, defendant Kimbrough affirmatively testified that Flowers had no involvement with the conspiracy, the drugs, the gun or any of the other incriminating evidence.

In the same case, Johnson argued that she should receive a reduction for acceptance of responsibility because she pled guilty to the robberies and thus accepted responsibility. The District Court ruled that even though Johnson pled guilty and admitted to her role in the bank robberies, she denied her earlier written statement wherein she told the police of the involvement of her co-defendant Murray in the robberies and thus she misled the law enforcement officers. The Fourth Circuit found no error in the District Court's ruling making reference to U.S.S.G. Section 3E1.1, comment. (n.5) that since Johnson received an obstruction of justice enhancement it normally indicates that she has not accepted responsibility because she is denying relevant conduct such as her involvement with Murray in the bank robberies and Murray's involvement in the bank robberies. In the same manner, in the instant case, the defendant even though he pled guilty to all counts in the indictment he has denied relevant conduct which includes his involvement with Flowers in the conspiracy and Flowers' involvement in the conspiracy. Clearly defendant's conduct is inconsistent with someone who accepts responsibility.

CONCLUSION

For the reasons state[d] and the authority cited the defendant should be enhanced for obstruction of justice and denied acceptance of responsibility because of his perjurious testimony. This position is consistent with the

rationale of the Sentencing Guidelines because no defendant should be rewarded for committing perjury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 2005, a true copy of the foregoing Response was mailed to defendant's attorney, Riley H. Ross, Federal Public Defender's Office, Town Point Center, Suite 403, 150 Boush Street, Norfolk, Virginia 23510 and Sean C. Mitchell, Senior U.S. Probation Officer, 600 Granby Street, Suite 200, Norfolk, Virginia 23510.

/s/ W D Muhr
William D. Muhr
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,	:	
v.	:	Case No. 2:04cr185
DERRICK KIMBROUGH	:	

POSITION OF PARTIES WITH RESPECT TO THE SENTENCING FACTORS

(Filed Apr. 1, [illegible])

COMES NOW the defendant, Derrick Kimbrough, by counsel, in accordance with Section 6A1.2 of the Sentencing Guidelines and Policy Statements as well as this Court's sentencing Order, and hereby notes his objections to the Probation Office's advisory pre-sentence report ("PSR") and states his sentencing position.

Obstruction of Justice Enhancement

The PSR subjects Mr. Kimbrough to a 2-point enhancement for "his attempts to obstruct or impede justice." The enhancement is based entirely on the Government's allegation that Mr. Kimbrough offered false testimony during the trial of co-defendant Joel Flowers in an attempt to exonerate Mr. Flowers. However, Mr. Kimbrough has not been charged, much less convicted, of such an offense. Moreover, the jury acquitted Mr. Flowers of possessing with the intent to distribute more than 50 grams of cocaine base. As such, it cannot be said that the jury believed Mr. Kimbrough lied when he testified.

Acceptance of Responsibility

The PSR fails to reduce Mr. Kimbrough's offense level for Acceptance of Responsibility despite the fact that he pled guilty to each offense in which he was charged and has accepted responsibility for his role throughout all proceedings. The PSR notes that the Acceptance of Responsibility determination hinges on the Court's ruling on the Obstruction of Justice issue. However, it should be noted that the advisory Guidelines allow for adjustments under both categories in extraordinary circumstances. *See* U.S.S.G. § 3E1.1 cmt. n4. Here, Mr. Kimbrough did the extraordinary in turning down a plea offer to dismiss Count 4 – an 18 U.S.C. § 924(c) charge carrying a mandatory 5-year sentence that must run consecutive to the sentence resulting from the remaining counts. Instead, Mr. Kimbrough chose to plead guilty to each count against him, without the benefit of a plea agreement. As such, despite the Court's ruling on the Obstruction of Justice enhancement, Mr. Kimbrough has demonstrated extraordinary acceptance and should receive the appropriate reduction to his advisory guideline range.

Sentencing Position

As this Court is well aware, *United States v. Booker*, 125 S. Ct. 738 (2005), did away with the mandatory nature of the federal sentencing guidelines. The result is that district courts must now impose a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). Specifically, courts must consider the need for the sentence imposed –

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

If the Court's sentence is to reflect the seriousness of the offense, promote respect for the law and provide a just punishment for the offense, the impact of the powder-crack cocaine disparity must be addressed. The sentence called for by the guidelines is driven largely by the weight of and type of drug. Here, Mr. Kimbrough is attributed with possessing 56 grams of cocaine base, or "crack" cocaine and 92.1 grams of powder cocaine. Using the 100 to 1 ratio advocated by the Guidelines, the probation officer converted the crack cocaine to powder cocaine for a total of 5,692.1 grams or 5.69 kilograms of powder cocaine. This weight resulted in an Offense Level of 32 and when coupled with Mr. Kimbrough's Criminal History Category of II results in a Guideline Range of 135-168 months.[1] On the other hand, if the weight of the drug remained the

[1] This computation does not include adjustments pursuant to the Obstruction of Justice and Acceptance of Responsibility categories. If the PSR recommendations are followed as to these categories, the resulting Guidelines Range would be 168-210 months.

same (148.1 grams), but Mr. Kimbrough was in possession of only powder cocaine, the resulting Offense Level would be 18. *See* U.S.S.G. § 2D1.1(c)(11). When paired with a Criminal History Category of II, Mr. Kimbrough would be facing a Guidelines Range of 30-37 months.[2] Thus, it is apparent that the crack cocaine sentencing scheme with its 100-to-1 ratio generates unjustifiable disparities in sentencing.

This disparity in sentencing has long been criticized by courts, *see United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring), commentators, *see The Debate on 2002 Federal Drug Guideline Amendments*, 14 Fed. Sen. Reptr. 123, 188-242 (Nov./Dec. 2001-Jan./Feb. 2002); *Rethinking the Crack Cocaine Ratio*, 10 Fed. Sen. Reptr. 179, 184-208 (Jan./Feb. 1998), and the Sentencing Commission. *United States v. Smith*, ___ F. Supp. 2d ___, 2005 WL 549057, at *9, 2005 U.S. Distr. LEXIS 4177, at *28 (E.D. Wis. Mar. 3, 2005).

In its 2002 Report to Congress, the U.S. Sentencing Commission suggested a change in the disparity of sentences for cocaine base and powder cocaine. The Commission reported in part the following findings: (1) the current penalties exaggerate the relative harmfulness of crack cocaine; (2) the current penalties sweep too broadly and apply most often to lower level offenders; (3) the current penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; and (4) the current penalties' severity mostly impacts minorities.

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[2] Mr. Kimbrough acknowledges that he is required to serve the 10-year statutorily required minimum sentence under Counts One, Two, and Four and the 5-year consecutive mandatory minimum required by Count Three, for a combined minimum sentence of 15 years.

Based upon its findings, the Commission unanimously and firmly concluded "that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio." United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* at v-viii (May 2002), also available online at http://www.ussc.gov/reports.HTM.

" . . . [A]fter *Booker* district courts need no longer blindly adhere to the 100:1 guideline ratio." *Smith*, 2005 WL 549057, at *9, 2005 U.S. Dist. LEXIS 4177, at *28. In *Smith*, the guideline imprisonment range was determined to be 121-151 months. Under 21 U.S.C. § 841(b)(1)(A), a 10 year mandatory minimum sentence also applied. The court sentenced defendant to 18 months imprisonment followed by 5 years of supervised release, stating

> Even after modifying the advisory guideline range based on the Commission's recommendations regarding crack cocaine, I believed the range to be somewhat greater than necessary because it did not take into account defendant's good conduct since he committed this offense over four years ago, his employment history and community involvement, and his importance to his family. I concluded that it would be appropriate to impose a non-guideline sentence to allow small reductions for these factors. . . . Considering all of the § 3553(a) factors, I concluded that a sentence of 18 months was sufficient, but not greater than necessary to serve the purposes of sentencing.

Smith, 2005 WL 549057, at *10, 2005 U.S. Dist. LEXIS 4177 at *30-31. In dropping below a federal sentencing guideline range for "crack" cocaine in the case of *United States v. Mulvey*, No. 03-10075-001 (C.D. Ill. Feb. 11, 2005),

U.S. District Judge McDade made the same observation regarding the disparities,

> "Given the Draconian punishment associated with crack cocaine, to follow the guideline range for this case would go beyond what is needed to serve the purpose of sentencing. . . . Respect for the law doesn't always mean sending people to prison for as long as you can."

see Elaine Hopkins, *McDade Sentencing Below Guidelines: Judge Says this Crack Cocaine Case Merited a Discretionary Approach*, Peoria Journal Star, Inc., February 12, 2005; also available online at http://www.pjstar.com/stories/021205/TRI_B5IGJJSI.012.shtml.

Given this unfair disparity, Mr. Kimbrough respectfully asks this Court to sentence him [to the] 15-year or 180 month statutorily required minimum sentence. Such a sentence would reflect the seriousness of the offense in addition to promoting respect for the law and providing a just punishment since it would not be guided by the unjustifiable crack-powder cocaine disparity.

A sentence of the statutorily required minimum 15-years would also meet the remaining requirements of 18 U.S.C. § 3553(a)(2) as such a sentence would no doubt afford adequate deterrence to criminal conduct, protect the public form [*sic*] further crimes by Mr. Kimbrough and provide him with the opportunity to partake in many of the Bureau of Prison programs.

Respectfully submitted,

Derrick Kimbrough

By /s/ Riley H. Ross III
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Position Paper was mailed this 31st day of March, 2005, to William D. Muhr, Assistant United States Attorney, 8000 World Trade Center, 101 West Main Street, Norfolk, VA 23510 and Sean C. Mitchell, Senior U.S. Probation Officer, 600 Granby Street, Suite 200, Norfolk, VA 23510.

/s/ Riley H. Ross III
Riley H. Ross III
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	
	)	
V.	)	CRIMINAL ACTION
	)	
DERRICK KIMBROUGH,	)	NO. 2:04cr185
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

April 11, 2005

(Sentencing Hearing)

Before: THE HONORABLE RAYMOND A. JACKSON
United States District Judge

Appearances:

UNITED STATES ATTORNEY'S OFFICE
BY: WILLIAM D. MUHR, ESQUIRE
Assistant United States Attorney
Counsel for the United States

OFFICE OF THE FEDERAL PUBLIC DEFENDER
BY: GRETCHEN LYNCH TAYLOR, ESQUIRE
Counsel for the Defendant

The defendant appearing in person.

Also Present:

Sean C. Mitchell, Probation Officer

[2] THE DEPUTY CLERK: Case No. 2:04cr185, United States of America versus Derrick Kimbrough.

Mr. Muhr, is the government ready to proceed?

MR. MUHR: The government is ready, Your Honor.

THE DEPUTY CLERK: Ms. Taylor, is the defendant ready to proceed?

MS. TAYLOR: Yes, we are ready. Good morning, Your Honor.

THE COURT: Good morning, ladies and gentlemen. Have you had adequate time to prepare Mr. Kimbrough for the hearing?

MS. TAYLOR: Yes, Your Honor.

As the Court knows, Mr. Riley Ross has been representing Mr. Kimbrough throughout the pendency of this case. Mr. Ross is out of the country, and I am prepared to go forward today on his behalf.

THE COURT: Mr. Kimbrough, are you fully satisfied with the advice and counsel of Ms. Taylor in the case?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You may have a seat.

The Court notes in examining the presentence report, which is the first matter the Court needs to address, there is an objection to the presentence report to the two-point enhancement for obstruction of justice and for the failure to attribute any points to the defendant for the acceptance of [3] responsibility. Have you, Mr. Muhr and Ms. Taylor, resolved these two objections?

MR. MUHR: No, Your Honor.

THE COURT: All right. Mr. Muhr, the government has the burden of proof by a preponderance of the evidence on the obstruction enhancement. Is there anything you wish to say about the obstruction enhancement?

MR. MUHR: Yes, Your Honor. I mean, obviously the Court heard the trial of Mr. Flowers and heard Mr. Kimbrough testify at that particular trial. Your Honor, it's the government's opinion that Mr. Kimbrough committed perjury when he testified at that particular trial. I listed – and I don't want to take up the Court's time, but I listed a number of things in my written brief to the Court of examples of where he was not truthful in what he was trying to tell the jury.

What it basically boiled down to is he was trying to tell the jury that all the evidence belonged to him; he, alone, was guilty; and that Mr. Flowers – none of the evidence belonged to him. He was innocent and knew nothing of this evidence. I think the evidence spoke to the contrary in this case, and of course, the jury verdict also came down on the side of guilt of Mr. Flowers, that they also did not believe Mr. Kimbrough in this.

Your Honor, in *United States versus Dunnigan*, as I stated in my written response on this, is perjurious, false [4] testimony concerning a material matter with the willful intent to provide false testimony, and I think that's what he has done, Your Honor. He has willfully presented false testimony in this Court in trying to deceive a jury in getting a jury to acquit Mr. Flowers, and clearly under, I think it's paragraph 4 of 3C1.1, that giving perjury is clearly an example of a case in which the defendant should be assessed a two-point enhancement for obstruction of justice.

Of course, obstruction of justice can occur during any portion of a case. It can occur during the investigation, during the actual trial or during the sentencing, and I think that he committed perjury in this case, Your Honor, and I would ask that the Court also find that he committed perjury and assess him a two-point enhancement.

THE COURT: Okay. Ms. Taylor.

MS. TAYLOR: Would you like me to just address the obstruction of justice issue independently?

THE COURT: I would like you to address the obstruction of justice issue, yes.

MS. TAYLOR: Yes, Your Honor.

Your Honor, of course, now, I wasn't present for the trial of Joel Flowers, as the Court and counsel for the government was, so I'm relying on Mr. Ross's notes, but I do know, and Mr. Muhr just basically said, that Mr. Kimbrough, the substance of his testimony was that he was accepting [5] responsibility for the evidence that the police found, for the gun, for the drugs, that sort of thing. It is his position, of course, that he did not commit perjury, that he told the truth and he didn't want to see an innocent man convicted, which, of course, Mr. Flowers was convicted of everything but, I believe, count two, if I'm not mistaken, one of the possession with intent to distribute counts.

So it would be Mr. Kimbrough's position that he did not commit perjury. He merely tried to do his civic duty and not let an innocent man get convicted. Unfortunately, he was not successful in that endeavor. He would ask the Court not to assess him two points for obstruction of justice. He never denied his culpability in the offense. He

merely told his position on the evidence before the Court, and he would ask you to not deem that to be perjury.

THE COURT: Mr. Muhr, the substance of your brief is that Mr. Kimbrough told the jury that all the evidence belonged to him and not to Mr. Flowers in this case, right? Now, the jury convicted Mr. Flowers of conspiracy. Is a conviction of Mr. Flowers for conspiracy inconsistent with them rejecting the testimony of Mr. Kimbrough that all the evidence was his? In other words, merely because they found that there was a conspiracy doesn't mean that the jury determined that all of the evidence did not belong to Mr. Kimbrough.

MR. MUHR: Well, Your Honor, I think it was more than [6] just some general statement that he said up there. He gave a lot of specifics, and basically what he was doing is he was trying to take every fact that could possibly incriminate Mr. Flowers and explain it away is what he was doing, and he was doing that consistently throughout.

THE COURT: I understand exactly what he did. I heard his testimony. I also heard his testimony and heard the testimony of the police officers, and as the Court recalls the testimony here, the testimony, there was a conflict in the police officers' testimony about what happened here between the two police officers as well as a conflict with Mr. Kimbrough here. So it wasn't a clean-cut he said, she said type of case that the Court had here.

Also, the Court is concerned on this enhancement that apparently the jury believed something he said because they also acquitted at the same time Mr. Flowers of one of the key charges here, that is, his possession with the intent to distribute the crack cocaine that was also in the

car. So it's not as clean-cut and clear as the Court would certainly want it to be in looking at what the jury believed in terms of what Mr. Kimbrough told them.

The Court's been thinking about this thing. That's what concerns the Court, trying to parse out what the jury rejected, what the jury believed in view of the fact the jury appeared to have credited some of his testimony about what [7] happened out there.

MR. MUHR: Well, Your Honor, clearly the main charge in this thing is the conspiracy charge, and Mr. Kimbrough was clearly, I think without a doubt, trying to convince the jury that Mr. Flowers was not in this conspiracy with him; that he didn't know anything about any of these drugs. He didn't even know anything about the gun. He's also got the 924(c) count with him saying that he was the one that had the gun. Of course, there was a lot of conflict with that. At one point he says he knew he dropped it. Then later he says no, he didn't, though he pointed out where he dropped it.

I think he clearly was trying to convince the jury that Mr. Flowers had nothing to do with any of those counts in that indictment and was trying to explain away all the evidence that would incriminate Mr. Flowers. In doing that, I think he committed perjury by doing that, by telling them that he had nothing to do with it, by saying the various things, particularly like, say, regarding that gun.

If you remember, on direct he said he felt it slip and hit the ground. He actually heard it hit the ground. Then he said because it was a rip in the holster. Well, there was no rip in the holster. Then when I cross-examined him, then he says, well, no, I didn't know it dropped out then. The only time I recognized it was gone is when that

strange guy was by my door and I pulled the gun out. But yet at the same time [8] when he was on direct, he pointed out exactly where he dropped it, though later he says he didn't know he dropped it. So he's trying to separate that gun from Mr. Flowers who had that gun in his possession when he was running from the police, along with all the drugs and all the other evidence, and I think in doing that, Your Honor, he tried to convince the jury of something that wasn't true, and in that he committed perjury.

THE COURT: All right. So the specific statement you now identify is the fact that Mr. Flowers – Mr. Kimbrough testifies that he had the firearm, that he dropped the firearm here, and Mr. Flowers did not have the firearm.

MR. MUHR: He clearly said to that, and I gave the example – in my written response I gave various examples, and that was one of them in there.

THE COURT: Well, that's one of the clearest ones, and I think Mr. Flowers was convicted of being in possession of the firearm.

MR. MUHR: Yes, he was. He was convicted of the 924(c), Your Honor.

THE COURT: Okay. Thank you.

In order to make a determination that perjury occurred here, the government has to establish by a preponderance of the evidence that the defendant gave testimony under oath concerning a material matter with willful intent to deceive. Okay? And the Court has to in the sentencing [9] identify what the specific factual statements are.

I think the record will reflect for the purposes of this perjury enhancement here that the defendant did provide testimony under oath. His testimony did concern a material matter that had to do with who possessed the firearm at the scene of the crime. That's inescapable.

The next element is whether he did it with willful intent to deceive rather than as a result of confusion, mistake or faulty memory. There is no mistake about Mr. Kimbrough's testimony here. The Court heard Mr. Kimbrough's testimony very clearly. He was not confused. He did not have any faulty memory. The Court is persuaded that Mr. Kimbrough did want to persuade the jury that he in fact had this firearm and not Mr. Flowers. To that extent, the Court would have to find, and the Court will conclude, that he did in fact intend to deceive or mislead the jury. The jury specifically rejected that testimony.

The Court struggled with this whole issue here, whether the Court should find he in fact committed perjury, but in this instance, the Court has just simply come to the conclusion, in looking at these elements, that he committed perjury on that particular point, and so the Court is going to find that he did in fact commit perjury with respect to who had the firearm.

For that reason, the Court is going to overrule the [10] objection to the two-point enhancement for obstruction of justice. However, that does not end the Court's inquiry, because the Court next has to determine whether he should be denied two points for acceptance of responsibility.

As the law goes, it is generally inconsistent with acceptance of responsibility to have two points or any points for obstruction of justice in this case. And in this

case, the Court has said that the two points for obstruction of justice should remain.

The Court is aware of *United States versus Murray* wherein the issue of one receiving points for acceptance of responsibility in the face of obstruction was considered. The question becomes, and I will give counsel a chance to comment on it, whether the defendant still should receive the two points for acceptance of responsibility notwithstanding the obstruction enhancement.

All right. Mr. Muhr. – no, you don't go first. I think it's Ms. Taylor who goes first.

MS. TAYLOR: Your Honor, I think this case does present an extraordinary circumstance. I can't think of a case and in doing an informal poll of my office, no one else in my office could think of a case where someone who intended to plead guilty turned down a government offer to drop a 924(c) mandatory minimum 60-month charge and still pled guilty to it. It's one thing if they wanted to try to go to trial and try to [11] prove their innocence, but Mr. Kimbrough has maintained from the beginning that, no, he was guilty of each and every one of his charges. He maintained also that Mr. Flowers was not.

But I think this is a case that although obstruction of justice and acceptance are linked in a lot of cases, in this case it's different, because his obstruction basically is due to the fact of him accepting responsibility. Because he wanted to go on that stand and tell the jury, no, he was responsible for everything. He turned down a government offer to plead guilty, just so he could plead guilty to each and every count because he felt that he was guilty and that was the right thing to do.

So I think this does present an extraordinary case here, a case where a defendant has gone out of his way to not only plead guilty to every count, but then also give testimony that he was guilty of each and every count.

THE COURT: But in doing that, then, the government is going to argue, yes, that's true, he wants to accept of [*sic*] responsibility, but he in fact misled the jury in trying to accept responsibility.

MS. TAYLOR: I know that's their position, Your Honor, and I think the probation officer in the presentence report makes it very clear that one hinges on the other. You know, the whole point of denying Mr. Kimbrough acceptance of responsibility is obviously that testimony, but we would [12] maintain that that testimony does demonstrate further his extraordinary responsibility here, because that was the substance of his testimony, to take credit for absolutely everything. So this presents a unique case, Your Honor, and I ask you to grant him a two-level reduction.

THE COURT: Okay. Fine.

MR. MUHR: Your Honor, as the Court noted on this, the guideline purely does say when one receives obstruction of justice that to receive acceptance of responsibility is not the normal course of how it should be done.

I think what the defendant is doing in this is he's calling his case an extraordinary case because he pled guilty to everything while in a plea agreement he would not have to have pled guilty; so, therefore, he really accepted responsibility. But you can't view these things separate from each other, you have to view them together.

He clearly got up there and in supposedly accepting responsibility misled the jury in his testimony in this.

I think, Your Honor, in *United States v. Murray* it's a case that's almost on point in this. It just has to do with a different offense than this, being a bank robbery. In that case, Your Honor, when Johnson took the stand in testifying at Murray's trial, earlier she had given a written confession about her involvement in the bank robberies and then his involvement in the bank robberies, and then denied those [13] confessions later on the stand and denied her signature on that written confession, and it was found that, therefore, she did not admit to all relevant evidence in this case. And I think that's what the defendant has done here, too.

In acceptance of responsibility, you have got to admit to all relevant evidence in this case, and that includes his conspiracy with Mr. Flowers, his involvement with Mr. Flowers involving the drugs and the guns and the other incriminating evidence, and I think the Court in *Murray* got it correct in not giving the defendant Johnson acceptance of responsibility for committing perjury on the stand, and I would ask in this case also, Your Honor, that he not receive acceptance of responsibility. One should not be rewarded, Your Honor, for committing perjury.

THE COURT: All right. Anything further you wish to say in rebuttal, Ms. Taylor?

Ms. Taylor, do you have any case law you want to cite to the Court?

MS. TAYLOR: No, sir, just the guidelines itself, that this would be an extraordinary case where the defendant has accepted responsibility.

THE COURT: Mr. Muhr, are you aware of exceptions to the situation where the defendant gets an enhancement for obstruction of justice yet receives acceptance of responsibility? Are you aware there are exceptions to that [14] general rule?

MR. MUHR: Your Honor, I know that the guidelines speak of that. It does not give an example, but as I said in my written brief, I think an example would be where somebody, say, committed obstruction of justice and then later did an act in order to try to amend for it. For example, if you committed obstruction at the investigation stage of a case but then pleaded guilty and testified against your codefendant, that would be an extraordinary case, I think, where one could then receive both. But in this case, there was no amends of any kind, and I don't see where it would fall out of the extraordinary in this case.

THE COURT: Okay. The case law doesn't offer a whole lot of guidance on when the Court should deem it appropriate to grant acceptance of responsibility notwithstanding obstruction of justice in a case.

In this case, the defendant apparently was confronted with a four-count indictment and had an opportunity to plead guilty pursuant to a plea agreement to counts in the indictment which did not include consecutive imposition of punishment for the gun count. The defendant rejected that plea agreement. Instead, came in and entered a plea of guilty to all four counts and indicated that he wished to accept responsibility for the entire offense and came forward and testified on behalf of the codefendant.

[15] In testifying for the codefendant, the defendant did in fact indicate that he accepted responsibility for all of the criminal conduct involved, but in the process of doing

it, the Court found that the defendant in fact misled the jury, that he in fact committed perjury about part of what he did.

The notion of acceptance of responsibility includes the proposition that one fully accepts the role he or she played in the commission of an offense. It is inconsistent with acceptance of responsibility to misle[a]d or otherwise commit perjury in relating the material matters involved in the offense.

The Court's determined that the Court is not going to grant the two points for acceptance of responsibility. Once again, the Court labored with the thoughts of doing just that, going the opposite direction, before it came in here, but the Court has determined the Court is not going to do that. On balance, the Court is not going to grant the two points for acceptance of responsibility. So the Court is going to overrule the objection.

All right. Any more objections to the presentence report?

MS. TAYLOR: No objections, Your Honor. I would just have further argument as to the appropriate range, but no more objections.

THE COURT: Okay. Well, we will get to that.

[16] The Court wants to make a finding here in this case with respect to the advisory sentencing guidelines in this case. Having overruled the objections to the presentence report, the Court finds that the criminal history category of the defendant in this case is II and the offense level is 34.

Now, the guideline range with respect to these counts indicate that the guideline sentencing range is 168 to 210, plus 60 months consecutive.

Would you stand up for a second, please, Mr. Kimbrough.

Mr. Kimbrough, the Court has just articulated the advisory sentencing guidelines in this case, but the Court wishes to advise you that's just one factor of many the Court is to consider in this case. The Court will have more to say about the advisory guideline range in a few minutes.

You have a right to call witnesses this morning to testify in this case about what the appropriate sentence should be. You have a right to put on witnesses or to testify yourself, if you desire to do so. If you testify under oath, you will be subject to cross-examination. If you make an unsworn statement from the podium, you will not be subject to cross-examination. You have an opportunity to remain silent, if you wish to do so.

Does he have witnesses he wishes to call, Ms. Taylor?

MS. TAYLOR: No, Your Honor.

[17] THE COURT: Does he wish to make a sworn or unsworn statement?

MS. TAYLOR: I don't believe he has any statements he needs to make, Your Honor.

THE DEFENDANT: No.

THE COURT: Are we certain of that?

MS. TAYLOR: Yes, Your Honor. He doesn't have any statements he wishes to make.

THE COURT: All right. Do you have any arguments you wish to make, Mr. Muhr?

MR. MUHR: Your Honor, I would ask that the Court adopt the recommendation of the guidelines in this case. The guidelines themselves, I mean, they take in many factors, including many of the factors in section 3553, which the Court also has to consider, without question, in this case, and I would ask that the Court do adopt that. I think that would be a reasonable sentence in the case so that I would ask the Court to sentence him somewhere within the guideline range, and of course, plus the 60 months for the 924(c).

THE COURT: Anywhere from 19 and 22 years.

MR. MUHR: Yes, sir.

THE COURT: You think that's an appropriate sentence?

MR. MUHR: I think it's a reasonable sentence, Your Honor.

THE COURT: All right. Thank you.

[18] All right. Ms. Taylor.

MS. TAYLOR: Your Honor, the defendant would ask you to sentence him to no more than the statutorily minimum required sentence of 180 months, and he does this based on several reasons.

The first reason, I think Mr. Ross did a good job of outlining in his position paper, and that is the crack

versus powder disparity. Even the U. S. Sentencing Commission admitted in its 2002 report to Congress that the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity mostly impacts minorities, which, of course, for the record Mr. Kimbrough is one.

We would ask you if the Sentencing Commission finds that the current penalties for crack cocaine are unduly harsh, then that I think goes right to the 3553 factors, and which of those factors would then apply to that? Perhaps the need to avoid unwarranted sentencing disparity because if – Mr. Kimbrough, he had actually more powder cocaine than he had crack cocaine in his possession, and certainly if he had had all powder cocaine, then he would be treated much less harshly under the guidelines. I believe Mr. Ross calculated that the guideline range would be 30 to 37 months. I guess that would [19] not include, obviously, the 60 months in addition on the 924(c). But obviously that's a tremendous disparity here.

I think it also goes to the factor of needing to promote respect for the law, because why would it promote respect to give someone a sentence so much harsher because some of the cocaine in his possession had been cooked up into crack form? So I would ask the Court to take that into account in fashioning a just punishment for Mr. Kimbrough.

In addition, when we look at Mr. Kimbrough's presentence report, as far as the nature and characteristics of this defendant, we look at his criminal history. He's got a

couple minor driving offenses, a couple failure to appears and two misdemeanor drug offenses. He was not a convicted felon until this case. So I think taking that into account also warrants a lesser punishment.

If you look at his presentence report, you can see that he has a work history, trade history. It's actually pretty unremarkable, his presentence report, and I think that's something to be commended. The less said the better in some of these reports. It's when you get the ones that are two inches thick that you have something to worry about.

Mr. Kimbrough's record, he's been essentially a law-abiding citizen for most of his life, so I would ask the Court to take that into account as well, and the fact that this was basically a state drug interdiction, a state case where the [20] police officers approached a car and because they saw someone crouched near it, and then uncovered cocaine and a firearm that fell from a codefendant's possession.

And finally, I think you could take into account, even if it technically didn't qualify for acceptance of responsibility under the guidelines purposes, you know, Mr. Kimbrough did come in here and plead guilty to every single one of these charges. Even when perhaps the gun charge would have been the weakest, he still accepted responsibility on that charge as well. So what I would ask you to do, Your Honor, is sentence him to 120 months on the drug charges concurrently and then consecutively 60 months on the 924(c).

Thank you.

THE COURT: All right. If you will come to the podium with Ms. Taylor, Mr. Kimbrough.

Is there anything you wish to say? No, that's right. Mr. Kimbrough is not making a comment. Sorry.

MS. TAYLOR: Yes, sir.

THE COURT: All right. The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the [21] most effective way.

One thing the statute tells the Court to do. That in fashioning a sentence, the Court is not to impose a sentence that is greater than necessary to accomplish the factors I just outlined. It is the Court's humble view that to impose a sentence of 19 to 22 years in this case is ridiculous. It imposes more punishment, given the record here, than is necessary to accomplish what needs to be done.

While the Congress, the Sentencing Commission recognizes that crack cocaine has not caused the damage that the Justice Department alleges it has, the Justice Department has yet to recognize the disproportionate and unjust effect that crack cocaine guidelines have in sentencing. This case is another example of how the crack cocaine guidelines are driving the offense level to a point higher than is necessary to do justice in this case.

In fashioning its sentence, the Court has considered the nature and the circumstances of this offense. Number one, this defendant and another defendant were caught sitting in a car with some crack cocaine and powder by two police officers – that's the sum and substance of it – with a

firearm. The Court understands how the offense was committed. The Court heard the facts in this particular case.

The Court has considered the history and characteristics of the defendant. The defendant in this case [22] does have a record of criminal violations, but it's a record involving misdemeanors, and as counsel points out, until this case, he has not had a felony conviction.

The Court is required to consider factors other than what the sentencing guidelines recommend because the sentencing guidelines constitute only one factor. The sentencing guidelines as calculated excludes consideration of a number of factors that Title 18, United States Code, 3553(a) tells the Court that the Court should consider.

The sentencing guidelines do not consider, in coming up with that range of 14 to 19 months, plus 60 months consecutive, do not consider the history and characteristics of the defendant. The sentencing guidelines do not consider the education and vocational skills of the defendant. It does not look at family ties and background. It does not look at military contributions. It excludes all of those. Yet the sentencing factors other than the guidelines says the Court should consider those.

Given the fact that the sentencing guidelines has come up with this guideline range excluding all the factors the law says the Court should consider, the Court cannot follow in rote fashion the sentencing guideline recommendation, and the Court will not follow it.

First of all, in terms of the defendant's criminal history, the Court has considered the criminal history, what it [23] was before he got involved in this case.

The Court also considers that this defendant at one time served in combat in Desert Storm and honored his country and received an honorable discharge, and that for [the] most part since he was honorably discharged, the defendant has been a construction worker and has found meaningful employment someplace. The sentencing guidelines say don't consider that, but the statute says consider it, so the Court will consider it.

The Court will also consider his employment record, his military contributions, his past history. The Court also considers significantly the fact that the crack cocaine involved in this case does in fact exaggerate the advisory sentencing guideline involved in this case.

It's amazing that when the Court goes back and calculates the offense in this case using powder cocaine, because we are dealing with cocaine at the end of the day in this case, the level, the guideline range comes down so significantly that it's unbelievable, so the Court has noted that in imposing the penalties in this case. So the Court believes should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case.

Given all of those factors and the Court's need to [24] avoid imposing an unwarranted disproportionate sentence, the Court will sentence this defendant as follows:

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court the defendant, Derrick Kimbrough, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of 180 months. That's 15 years, which is clearly long enough under the circumstances. As a matter of fact, it's

the Court's view that it's too long, but the Court is bound by the mandatory minimum of ten years on three of these counts.

This 180 months consists of 120 months on count one, 120 months on count two, 120 months on count three, to be served concurrently, and a term of 60 months on count four to be served consecutively.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years on count one, two and four, and three years on count three, all to run concurrently.

You shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter as directed by the probation officer.

You shall also comply with the following additional conditions: You shall participate in a drug education program approved by the United States Probation Office with partial [25] cost to be paid by you, as directed by the probation officer.

You shall pay for the support of your minor children, as directed by the probation officer. In the absence of any court-ordered child support payments, the Court will establish an amount or schedule of payments based upon your financial circumstances.

The Court has looked at your negative net worth, your lack of liquid assets and earning potential, and the Court finds you are not capable of paying a fine, but you are required to pay the mandatory special assessment of $100 on each count of conviction. Accordingly, you shall pay a

$100 special assessment on each of counts one, two, three and four, for a total special assessment of $400.

No restitution is involved. No fine is involved here.

Any balance remaining unpaid on your special assessment at the inception of your supervision shall be paid by you in installments of not less than $50 per month until paid in full. Said payments shall commence 60 days after your supervision begins.

You waived your right to appeal the sentence in this case as long as it was within the statutory maximum.

Is that still the case, Ms. Taylor?

MS. TAYLOR: He didn't waive –

MR. MUHR: He did not have a plea agreement.

[26] THE COURT: Oh, I'm sorry. That's right. He pled to everything.

Mr. Kimbrough, you have the right to appeal this sentence imposed upon you by this Court. If you wish to appeal, you must talk to Ms. Taylor and note your appeal of the Court's judgment within 10 days of the date the Court imposes it, which is today.

Are there any other matters to come before the Court, Mr. Muhr?

MR. MUHR: Your Honor, in all due respect, I have to put on the order the objection of going outside the guidelines as being unreasonable.

THE COURT: Mr. Muhr, you know, it almost – sure, Mr. Muhr.

MR. MUHR: Yes, sir.

THE COURT: Going outside the guidelines? This is post-Booker. The guidelines are advisory. Any sentence outside the advisory guidelines are not automatically unreasonable.

I realize you are doing your job, but I find it absolutely ridiculous the Department of Justice demands the heart and lungs, feet, and everything else in a case on these facts.

MR. MUHR: Yes, sir.

THE COURT: Anything else, Ms. Taylor?

[27] MS. TAYLOR: No, sir, Your Honor. Thank you.

THE COURT: All right. Court will be in recess until further notice.

(This hearing concluded at 12:15 p.m.)

* * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ X Sharon B. Borden X
Sharon B. Borden, RMR, FCRR

X June 8, 2005 X
Date

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Norfolk Division

UNITED STATES
OF AMERICA

v.

Case Number
2:04CR00185-002

DERRICK KIMBROUGH,

USM Number 60156-083

Defendant.

JUDGMENT IN A CRIMINAL CASE

(Filed Apr. 14, 2005)

The defendant, DERRICK KIMBROUGH, was represented by Riley H. Ross, III, Esquire.

The defendant pleaded guilty to count(s) 1, 2, 3, and 4. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	**CONSPIRACY TO POSSES[S] WITH INTENT TO DISTRIBUTE AND DISTRIBUTE CRACK COCAINE (Felony)**	**5-24-04**	**1**
21:841(a)(1) and (b)(1)(A)(iii) and 18:2	**POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE (Felony)**	**5-24-04**	**2**

21:841(a)(1) and (b)(1)(C) and 18:2	**POSSESS WITH INTENT [TO] DISTRIBUTE COCAINE (Felony)**	**5-24-04**	**3**
18:924(c)(1) and 18:2	**POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME (Felony)**	**5-24-04**	**4**

As pronounced on April 11, 2005, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 14th day of April, 2005.

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY (180) MONTHS**.

This term consists of One Hundred Eighty (180) Months on Count 1, One Hundred Twenty (120) Months on Count 2, One Hundred Twenty (120) Months on Count 3, **all to be served concurrently**; and Sixty (60) Months on Count 4, **to be served consecutively**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

c: 4/15/05 TL (date of distribution)
P.O. (2)
Mshl. (4)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

This term consists of Five (5) Years on Count 1, Five (5) Years on Count 2, Three (3) Years on Count 3, and Five (5) Years on Count 4, **all to run concurrently**.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

While on supervised release, the defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter, as directed by the probation officer.

2) The defendant shall participate in a program approved by the Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with partial cost to be paid by the defendant, all as directed by the probation officer.

3) The defendant shall pay for the support of his minor children in any amount ordered by any social service agency or court of competent jurisdiction. In the absence of any such order, payments are to be made on a schedule to be determined by the Court at the inception of supervision, based on defendant's financial circumstances.

4) Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total monetary penalties under the schedule of payments on Schedule of Payment – Sheet 6.

Count	Assessment	Fine	Restitution
1	$100.00		
2	$100.00		
3	$100.00		
4	$100.00		
Total	**$400.00**		

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

The special assessment shall be due in full immediately.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prison's Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Norfolk Division

UNITED STATES OF AMERICA

v.

Case Number 2:04CR00185-002

DERRICK KIMBROUGH,

USM Number 60156-083

Defendant.

***AMENDED**
JUDGMENT IN A CRIMINAL CASE

(Filed Apr. 22, 2005)

The defendant, DERRICK KIMBROUGH, was represented by Riley H. Ross, III, Esquire.

The defendant pleaded guilty to count(s) 1, 2, 3, and 4. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Ended	Count Number(s)
21:846	**CONSPIRACY TO POSSES[S] WITH INTENT TO DISTRIBUTE AND DISTRIBUTE CRACK COCAINE (Felony)**	**5-24-04**	**1**
21:841(a)(1) and (b)(1)(A)(iii) and 18:2	**POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE (Felony)**	**5-24-04**	**2**

21:841(a)(1) and (b)(1)(C) and 18:2	**POSSESS WITH INTENT [TO] DISTRIBUTE COCAINE (Felony)**	**5-24-04**	**3**
18:924(c)(1) and 18:2	**POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME (Felony)**	**5-24-04**	**4**

As pronounced on April 11, 2005, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in the defendant's economic circumstances.

Signed this 22nd day of April, 2005.

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District
Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY (180) MONTHS**.

This term consists of *One Hundred Twenty (120) Months on Count 1, One Hundred Twenty (120) Months on Count 2, One Hundred Twenty (120) Months on Count 3, **all to be served concurrently**; and Sixty (60) Months on Count 4, **to be served consecutively**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

c: 4-22-05 MN (date of distribution)
P.O. (2)
Mshl. (4)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

This term consists of Five (5) Years on Count 1, Five (5) Years on Count 2, Three (3) Years on Count 3, and Five (5) Years on Count 4, **all to run concurrently**.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

While on supervised release, the defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter, as directed by the probation officer.

2) The defendant shall participate in a program approved by the Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with partial cost to be paid by the defendant, all as directed by the probation officer.

3) The defendant shall pay for the support of his minor children in any amount ordered by any social service agency or court of competent jurisdiction. In the absence of any such order, payments are to be made on a schedule to be determined by the Court at the inception of supervision, based on defendant's financial circumstances.

4) Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total monetary penalties under the schedule of payments on Schedule of Payment – Sheet 6.

Count	Assessment	Fine	Restitution
1	$100.00		
2	$100.00		
3	$100.00		
4	$100.00		
Total	**$400.00**		

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

The special assessment shall be due in full immediately.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prison's Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
DERRICK KIMBROUGH,	)	2:04-CR-00185-002
	)	
Defendant.	)	
	)	

NOTICE OF APPEAL

(Filed May 12, 2005)

Notice is hereby given that the UNITED STATES OF AMERICA, plaintiff in the above-named case, appeals to the United States Court of Appeals for the Fourth Circuit from the Judgment and the Amended Judgment entered on April 14 and April 22, 2005, respectively, pursuant to 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/ W D Muhr
William D. Muhr
Assistant United States Attorney
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757) 441-6331

CERTIFICATE OF SERVICE

I, William D. Muhr, hereby certify that on May 12th, 2005, I caused a copy of the foregoing pleading to be sent by First Class U.S. Mail, proper postage prepaid, to:

Riley H. Ross III, Esq.
150 Boush Street, Suite 403
Norfolk, Virginia 23510

/s/ W D Muhr
William D. Muhr
Assistant United States Attorney

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-4554

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

DERRICK KIMBROUGH,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (CR-04-185)

Submitted: November 15, 2005 Decided: May 9, 2006

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Paul J. McNulty, United States Attorney, Michael J. Elston, Assistant United States Attorney, Alexandria, Virginia, for Appellant. Frank W. Dunham, Jr., Federal

Public Defender, Alexandria, Virginia; Riley H. Ross, III, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Norfolk, Virginia; Frances H. Pratt, Research and Writing Attorney, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

The Government appeals the district court's imposition of a sentence outside of the United States Sentencing Guidelines range based, in part, on the district court's disagreement with the disparity between sentences for crack and powder cocaine violations. We have jurisdiction to review the sentence pursuant to 18 U.S.C.A. § 3742 (West 2000). We review post-Booker sentences for reasonableness. United States v. Hughes, 401 F.3d 540, 546-47 (4th Cir. 2005).

Derrick Kimbrough pleaded guilty to distributing fifty or more grams of crack cocaine, distributing cocaine, conspiring to distribute fifty grams or more of crack cocaine, and possessing a firearm in connection with a drug trafficking crime. The sentencing guideline range was 168 to 210 months imprisonment for the drug counts and 60 consecutive months for the firearm count. Based, in part, on the district court's disagreement with the sentencing disparity for crack and powder cocaine violations, the district court sentenced Kimbrough to 120 months on each of the three drug violations, to be served concurrently, and

sixty months on the firearms charge, to be served consecutively. According to our recent decision in United States v. Eura, 440 F.3d 625 (4th Cir. 2006), a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses. Because the district court concluded that the crack to powder cocaine disparity warranted a sentence below the applicable sentencing guideline range, we are constrained to vacate Kimbrough's sentence and to remand the case for resentencing. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

VACATED AND REMANDED

JUDGMENT

FILED: May 9, 2006

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-4554
CR-04-185

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

DERRICK KIMBROUGH

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

---

In accordance with the written opinion of this Court filed this day, the Court vacates the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

A certified copy of this judgment will he provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 6, 2006

No. 05-4554
CR-04-185

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

DERRICK KIMBROUGH

Defendant - Appellee

On Petition for Rehearing En Banc

The appellee's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Williams, and Judge Motz.

For the Court,

/s/ Patricia S. Connor
CLERK

(ORDER LIST: 551 U.S.)

MONDAY, JUNE 11, 2007

* * *

CERTIORARI GRANTED

* * *

06-6330 KIMBROUGH, DERRICK V. UNITED STATES

06-7949 GALL, BRIAN M. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are granted and the petitions for writs of certiorari are granted.

* * *

(3)

No. 06-6330

In The
Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines must be applied as advisory only, and merely as one of a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a) in exercising its discretion in selecting a sentence and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's holdings, the following questions are presented.

(1) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary," may a district court consider either the impact of the so-called "100:1 powder/crack weight ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

(2) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary," how should a district court consider the factors articulated in the statute, and in particular, subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit appears at pages 96 to 98 of the Joint Appendix ("J.A."). The unpublished transcript of the sentencing hearing appears at pages 55 to 77 of the Joint Appendix.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction over the United States's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The court of appeals issued its opinion and judgment on May 9, 2006. J.A. 96. It denied Mr. Kimbrough's petition for rehearing on June 6, 2006. J.A. 100. Mr. Kimbrough filed his petition for a writ of certiorari on September 5, 2006, which this Court granted on June 11, 2007. J.A. 101. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

1. Derrick Kimbrough pled guilty in federal court to three drug offenses involving both powder cocaine and crack cocaine and to a firearm offense. The charges stemmed from his arrest by Norfolk, Virginia, police officers; the Commonwealth later dismissed the case in favor of federal prosecution. J.A. 30-33; Sealed J.A. 115. Two of the federal drug offenses set the punishment range at ten years to life imprisonment; the firearm charge carried a range of five years to life, to be served consecutively to the sentences on the drug offenses.

2. The imprisonment range recommended by the U.S. Sentencing Guidelines for the drug offenses was 168 to 210 months. This range was substantially higher than it would have been if the offenses had involved only powder cocaine because the Guidelines treat one gram of crack cocaine as equivalent to 100 grams of powder cocaine. Observing that after *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines are but one consideration in sentencing, the district court imposed the statutory mandatory minimum terms for both the drug and firearm offenses, for a total of fifteen years' imprisonment. The court identified several reasons for the sentence, including Mr. Kimbrough's minor criminal history, his military service, his steady work history, the "exaggerat[ion]" of the seriousness of the offense by the 100:1 powder/crack cocaine weight ratio used in the Guidelines, and the statutory principle of parsimony.

3. The sentence that the district court imposed was within the statutory limits, which required a sentence of no fewer than ten years of imprisonment on two of the counts of conviction because of the amount of crack cocaine

involved. That lower limit was established by Congress in the Anti-Drug Abuse Act of 1986. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986) (hereafter "ADAA"); *see generally* U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 116-23 (Feb. 1995) (hereafter "1995 Report"); U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 4-11 (May 2002) (hereafter "2002 Report"). The ADAA instituted mandatory minimum sentences for drug offenses based both on drug type and drug quantity. *See* 1995 Report at 114-16. The ADAA's mandatory minimum statutes marked the first appearance of the 100:1 powder/crack ratio, which requires 100 times as much powder cocaine than crack cocaine to trigger a mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A), (B). Why Congress selected that particular ratio is unclear. *See* 2002 Report at 7-8; 1995 Report at 117.

4. Within the statutory limits, the district court's sentencing discretion was also guided by the Sentencing Reform Act of 1984, as modified by this Court in *Booker*. *See* Sentencing Reform Act of 1984 (hereafter "the SRA" or "the Act"), Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1987; *Booker*, 543 U.S. at 245 (excising 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e)). Congress enacted the SRA to bring greater certainty and fairness to the federal sentencing system. *See* S. Rep. No. 98-225, at 39, 59, 65 (1983) (reporting on S. 1762, 98th Cong. (1983)), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220 *et seq.*; *Booker*, 543 U.S. at 264. Congress sought to reduce "[s]entencing disparities that are not justified by differences among offenses or offenders," including "sentence[s] that [are] unjustifiably high compared to sentences for similarly situated offenders" and "sentence[s] that [are] unjustifiably low."

S. Rep. No. 98-225, at 45-46; *see Booker*, 543 U.S. at 264. To this end, the SRA took a two-prong approach, in which it cabined, but did not eliminate, the traditional sentencing discretion of federal courts. S. Rep. No. 98-225, at 51-52.

5. First, Congress provided a statutory framework to guide district courts as to the specific goal of sentencing and the appropriate considerations for reaching that goal. The framework is codified at 18 U.S.C. § 3553(a), which instructs the sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection."[1] The purposes set out are broad and include the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A); *see also* 18 U.S.C. § 3551(a) (defendants to be sentenced "so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case"). To ensure that these purposes are fulfilled in each case, Congress directed sentencing courts to consider a number of specific factors, including the nature and circumstances of the offense, the history and characteristics of the defendant, the sentencing guideline range, and the need to avoid unwarranted sentence disparities. 18 U.S.C. § 3553(a)(1), (3)-(7). Section 3553(a)

[1] This language reflects the principle of parsimony and will be referred to in this brief as the "parsimony provision." One of the *amici curiae* in *Gall v. United States*, No. 06-7949, discusses the parsimony provision at length. *See* Brief of Families Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner, Part I.

does not direct a sentencing court to elevate any one factor over any other.

Second, Congress created the U.S. Sentencing Commission, charging it with "establish[ing] sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. § 991(b). Congress directed the Commission, in establishing "categories of offenses" for use in the Guidelines, to consider a number of factors, including "the nature and degree of harm caused by the offense," "the community view of the gravity of the offense," "the public concern generated by the offense," "the deterrent effect a particular sentence may have on the commission of the offense by others," and "the current incidence of the offense in the community and in the Nation as a whole." 28 U.S.C. § 994(c). Congress required the Commission to make sentencing ranges "consistent with all pertinent provisions" of Title 18, including the purposes of sentencing set forth in § 3553(a)(2). *See* 28 U.S.C. § 994(b)(1); S. Rep. No. 98-225, at 168.

The Sentencing Reform Act and the Guidelines were not intended to eliminate judicial discretion in sentencing. S. Rep. No. 98-225, at 51. In other words, the Guidelines were not to "be imposed in a mechanistic fashion" that would "eliminate the thoughtful imposition of individualized sentences." *Id.* at 52. And the thoughtful imposition of sentence by the district court was not, despite the provision for appellate review, to be "displaced by the discretion of an appellate court." *Id.* at 150.

6. As the SRA intended, the district court's sentencing decision in this case was also informed by the

guideline applicable to drug offenses. At the time that Congress set statutory limits for cocaine offenses using the 100:1 ratio, the Sentencing Commission was formulating its initial set of guidelines. Congress had not included any directive in the ADAA to implement the ratio in the Guidelines. Likewise, Congress had not amended any portion of the SRA to reflect or require the 100:1 ratio. In setting offense levels for drug offenses, however, the Commission used an ADAA-like type-and-quantity approach, linking base offense levels to the quantities of each drug that triggered the mandatory minimums. Additional base offense levels above, between, and below those minimums were based on extrapolation of drug quantities. *See* U.S.S.G. § 2D1.1(c) (drug quantity table).[2] For cocaine offenses, the Commission's decision had the effect of incorporating the statutory 100:1 ratio into the Guidelines.

7. By the early 1990s, many questions had arisen about the soundness of the 100:1 ratio. In September 1994, Congress directed the Commission to "address the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such

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[2] The Commission did not explain "why [it] extended the ADAA's quantity-based approach . . . across 17 different levels falling below, between, and above the two amounts specified in the statutes," which is "unfortunate for historians, because no other decision of the Commission has had such a profound impact," "increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 48, 49 (Nov. 2004) (hereafter "Fifteen Year Report").

differences in penalty levels." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, § 280006, 108 Stat. 1796, 1985, 2097.

The Commission responded six months later, concluding that "the present 100-to-1 quantity ratio is too great." 1995 Report at i. The Commission observed that, "[a]mong other problems, the 100-to-1 quantity ratio creates anomalous results by potentially punishing low-level (retail) crack dealers far more severely than their high-level (wholesale) suppliers of the powder cocaine that served as the product for conversion into crack." *Id.* Acknowledging that its own choice, not congressional will, had injected the ratio into the Guidelines, the Commission concluded that "[t]he guidelines should be refined to address better those harms that prompted Congress to establish the 100-to-1 quantity ratio." *Id.*

The Commission sent to Congress a proposed amendment, one that would have changed the quantities of crack cocaine in the Guidelines' drug quantity table to match the quantities of powder cocaine. *See* U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines for United States Courts*, 60 Fed. Reg. 25,074, 25,075-77 (1995) (amendment 5); U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 1 (April 1997) (hereafter "1997 Report"). Based upon its "consideration of the factors in the Special Report to Congress and the purposes of sentencing set forth in 18 U.S.C. [§] 3553," the Commission concluded that "the guideline provisions, as amended, will better take into account the increased harms associated with some crack cocaine offenses and, thus, the different offense levels based solely on the form of cocaine are not required." 60 Fed. Reg. at 25,077.

At the behest of the Department of Justice, Congress exercised its authority pursuant to 28 U.S.C. § 994(p) to reject the Commission's proposed amendment. *See* Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995) (rejecting crack amendment and money laundering amendment); U.S. Dep't of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 17 (Mar. 2002). Congress did not, however, direct the Commission to retain the 100:1 ratio. Instead, it told the Commission to try again, and asked for proposals revising the powder/crack ratio "in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth" in 18 U.S.C. § 3553(a). Pub. L. No. 104-38, § 2(a).

8. Twice more, the Sentencing Commission issued reports critical of the 100:1 ratio it had implemented. *See generally* 1997 Report; 2002 Report. The 2002 Report included new research recounting the recent literature and the results from the Commission's own extensive empirical study of federal cocaine offenses and offenders. *See* 2002 Report at v, 4. The Commission used the new information to evaluate the 100:1 ratio in light of the general and specific objectives set out in 18 U.S.C. § 3553(a). *Id.* As before, the Commission "*unanimously* and *firmly* conclude[d] that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio." *Id.* at viii-ix (emphasis added). Congress passed no further legislation on the subject in response to either report, but neither did it ever require that the 100:1 ratio be retained.

9. It was against this backdrop that the district court relied upon the information in the Sentencing Commission's 2002 Report as part of its rationale for imposing a sentence lower than the guideline range

suggested for Mr. Kimbrough's case. The record demonstrates that, in selecting the sentence, the court accounted for both the rules that bound it and the discretion afforded to it by Congress and this Court.

After ruling on Mr. Kimbrough's objections to the guideline calculations of the presentence report, the court found that "the guideline range with respect to these counts indicate[s] that the guideline sentencing range is 168 to 210, plus 60 months consecutive." J.A. 61-63, 66-68. Thus, the total range, including the consecutive 60 months, was 228 to 270 months, or 19 to 22.5 years.

Regarding the specific sentence to impose, the prosecutor asked that "the Court adopt the recommendations of the guidelines [because] they take in many factors, including many of the factors in section 3553, which the Court also has to consider." J.A. 69. When asked by the court if the government thought that "[a]nywhere from 19 and 22 years" was "an appropriate sentence," the prosecutor answered, "I think it's a reasonable sentence, Your Honor." *Id.*

Defense counsel sought a lower sentence. Noting the disparity in sentencing between crack and powder cocaine, counsel observed that Mr. Kimbrough "had actually more powder cocaine than he had crack cocaine in his possession." J.A. 70. Counsel cited the Sentencing Commission's findings that "the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity most impacts minorities." *Id.* Counsel explained how those

findings related to the factors that the court was required by 18 U.S.C. § 3553(a) to consider in arriving at a sentence, in particular the need for the sentence to avoid unwarranted disparity, promote respect for the law, and impose a just punishment. *Id.* Additionally, counsel asked the court to consider Mr. Kimbrough's lack of prior felony convictions, his steady work history, the fact that the case resulted from a state, not federal, drug interdiction, and the fact that Mr. Kimbrough voluntarily submitted himself to a minimum 180-month sentence by pleading guilty as charged. *Id.* at 70-71.

At no point before or during the sentencing hearing did the prosecutor argue that the court could not consider the 100:1 ratio. At no point did the prosecutor argue that the Sentencing Commission's reports were not relevant or reliable. At no point did the prosecutor respond to any other of defense counsel's points about an appropriate sentence. *See* J.A. 41-47, 69.

10. Before imposing the sentence, the district court explained its decision:

> The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective way.

J.A. 72. The court recognized that it was "required to consider factors other than what the sentencing guidelines recommend because the sentencing guidelines constitute only one factor. The sentencing guidelines as calculated

exclude[] consideration of a number of factors that [§] 3553(a) tells the Court that the Court should consider" – things such as the history and characteristics of the defendant, his educational and vocational skills, his family ties and background, and his military record[3] – "[y]et the sentencing factors other than the guidelines say[] the Court should consider those."[4] J.A. 73.

The court noted that "[o]ne thing the statute tells the Court to do . . . is not to impose a sentence that is greater than necessary to accomplish the factors I just outlined." J.A. 72. The court then found "that to impose a sentence of 19 to 22 years in this case is ridiculous" because "[i]t imposes more punishment, given the record here, than is necessary to accomplish what needs to be done." *Id.* The court made a detailed explanation of this finding.

First, the court recognized that while the offenses involved both powder cocaine and crack cocaine, the latter "dr[ove] the offense level to a point higher than is necessary to do justice in this case." J.A. 72. The court specifically relied upon the fact that "the Sentencing Commission [has] recognize[d] that crack cocaine has not caused the damage that the Justice Department alleges it has" and on its recognition of "the disproportionate and unjust effect that crack cocaine guidelines have in sentencing." *Id.* The court also considered Mr.

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[3] *See* U.S.S.G. §§ 5H1.2, p.s., 5H1.5, p.s., 5H1.6, p.s., 5H1.11, p.s.

[4] *See* 18 U.S.C. § 3553(a)(1) (a sentencing court "shall consider . . . the history and characteristics of the defendant"); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); 21 U.S.C. § 850 (same).

Kimbrough's history and background, such as the fact that while Mr. Kimbrough had a criminal record, "it's a record involving misdemeanors, and as counsel points out, until this case, he has not had a felony conviction." *Id.* at 73. Further, the court considered "that this defendant at one time served in combat in Desert Storm and honored his country and received an honorable discharge, and that for [the] most part since he was honorably discharged, the defendant has been a construction worker and has found meaningful employment." *Id.* at 74.

Finally, returning to the fact that the offense involved both crack and powder cocaine, the court noted "that the crack cocaine involved in this case does in fact exaggerate the advisory sentencing guideline" range and that "should [the court] follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case." J.A. 74. Accordingly, "[g]iven all of those factors and the [c]ourt's need to avoid imposing an unwarranted disproportionate sentence," the court sentenced Mr. Kimbrough to 120 months on each of the drug convictions and to 60 months on the firearm conviction, for a total of 180 months, "which is clearly long enough under the circumstances." *Id.* When the government noted its general objection to the court's choice of sentence "as being unreasonable," the court responded, "Going outside the guidelines? This is post-*Booker*. The Guidelines are advisory. Any sentence outside the advisory guidelines [is] not automatically unreasonable." *Id.* at 76-77.

11. On appeal by the government, the United States Court of Appeals for the Fourth Circuit found the sentence unreasonable *per se*. J.A. 98. The Fourth Circuit did not

consider the numerous circumstances articulated by the district court. Rather, it simply stated that "[a]ccording to our recent decision in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), a sentence that is outside the guideline range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." *Id.* at 98. The court vacated Mr. Kimbrough's sentence and remanded the case for resentencing. *Id.* at 98, 99.

SUMMARY OF ARGUMENT

Federal district courts have broad authority to consider information when exercising their discretion in sentencing defendants pursuant to 18 U.S.C. § 3553(a). A court cannot exercise its discretion, however, if it is forbidden by a court of appeals from considering reliable information relevant to sentencing. This case asks whether § 3553(a) can be read to bar a district court from considering a variety of factors, including its disagreement with the Sentencing Guidelines, in imposing a sentence. The answer is "no." The statute's plain language strongly supports the district court's exercise of discretion both in considering information and in selecting a sentence.

The district court in Mr. Kimbrough's case considered research and recommendations published in a series of reports by the U.S. Sentencing Commission – the agency entrusted by Congress with developing and implementing sentencing policy – demonstrating that the 100:1 powder/crack cocaine ratio used in the drug guideline was unfair and resulted in sentences greater than necessary to meet the objectives of § 3553(a). The court used both this

information and other case-specific information to consider the statutory purposes and factors relevant to the case. After doing so, the court imposed a sentence that it concluded met the requirements of § 3553(a) even though it fell below the range recommended by the now-advisory Guidelines. The Fourth Circuit rejected the district court's approach, holding that the sentence was *per se* unreasonable because the lower court relied in part upon the Sentencing Commission's reports to conclude that a non-guideline sentence was appropriate. That rejection cannot be sustained.

This Court's long-standing precedents and the sentencing scheme enacted by Congress impose no categorical bar on the types of information that may be considered by a district court in imposing a sentence. On the contrary, three separate statutes, 18 U.S.C. § 3553(a), 18 U.S.C. § 3661, and 21 U.S.C. § 850, authorize district courts to consider all relevant information; the last specifically applies to drug cases such as Mr. Kimbrough's. The Fourth Circuit's ban on such information in the context of crack cocaine cases cannot be upheld because it contravenes this authority. For this reason alone, the Fourth Circuit's judgment must be reversed.

The Fourth Circuit's *per se* rule improperly limits sentencing courts' discretion in additional ways. First, the ruling is based on the court of appeals's erroneous view of the "will of Congress" in regard to the 100:1 ratio. The only controlling congressional "will" is that expressed in the statutory mandatory minimums and maximums that the legislature has enacted for drug offenses. The district court did not disobey congressional will in that regard. Moreover, the court of appeals was wrong in believing that Congress required use of the 100:1 ratio in the Sentencing

Guidelines. Indeed, the evidence is to the contrary: Congress has never directed the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines, and it has in fact acknowledged that the ratio is problematic.

Next, the Fourth Circuit's prohibition on disagreement with the crack cocaine guideline has effectively made that guideline mandatory again. Subject only to the overarching command to impose a sentence no greater than necessary to meet the purposes of sentencing, § 3553(a) places all of its specified considerations on an even footing. But the Fourth Circuit has elevated consideration of the advisory guideline range (subsection (a)(4)) and an incorrect conception of what it means to avoid unwarranted disparity (subsection (a)(6)) over the other considerations in § 3553(a) and, indeed, over even the parsimony provision. Nothing in § 3553(a) permits such an elevation of these factors. Moreover, contrary to the Fourth Circuit's view, a construction of § 3553(a) that places subsections (a)(1)-(7) on an equal footing will not lead to *unwarranted* disparity.

If allowed to stand, the Fourth Circuit's *per se* rule would violate the Sixth Amendment because it impermissibly restricts district courts' discretion in crack cocaine cases. As this Court ruled in *Booker*, either the Sentencing Guidelines are advisory or they are unconstitutional. The court of appeals's rule is so strict that the court believed itself constrained to reverse Mr. Kimbrough's sentence even though it was based only in part on the district court's disagreement with the crack cocaine guideline. This Court can avoid the constitutional problem, however, by reiterating that the Sentencing Guidelines are not simply "effectively advisory," but are in fact "truly advisory," and by placing the sentencing range

suggested by the Guidelines on an even footing with the other considerations of § 3553(a).

Finally, the Fourth Circuit's rule of *per se* reversal is insufficiently deferential to district courts. The long tradition of appellate deference to sentencing courts' decisions was not eliminated by the Sentencing Reform Act; rather, as this Court has recognized, it continued even while the Sentencing Guidelines were mandatory. Appellate deference has acquired new significance now that § 3553(a), and not the Guidelines, governs sentencing courts' decisions. The Fourth Circuit thus should have deferred to the district court's considered judgment of the appropriate sentence in this case. The appellate court's failure to do so must be reversed.

ARGUMENT

I. DISTRICT COURTS HAVE THE AUTHORITY TO INDEPENDENTLY ASSESS WHETHER THE 100:1 POWDER/CRACK COCAINE RATIO PRODUCES AN APPROPRIATE OUTCOME WHEN SENTENCING DEFENDANTS PURSUANT TO 18 U.S.C. § 3553(a).

A cornerstone of federal criminal law is that district courts may consider a broad range of information for the purpose of imposing sentence. This practice reflects the unremarkable proposition that the craft of fashioning just and proportionate sentences benefits from consideration of relevant information. In Mr. Kimbrough's case, the district court based its sentence, in part, on its assessment that the 100:1 powder/crack cocaine ratio used by the U.S. Sentencing Guidelines resulted in a sentence greater than

necessary to achieve the goals set out by Congress in 18 U.S.C. § 3553(a). That assessment is strongly supported by a series of reports from the Sentencing Commission itself. The Fourth Circuit, however, held that disagreement with the 100:1 ratio was *per se* unreasonable. The court of appeals was wrong.

The plain texts of 18 U.S.C. § 3553(a) and § 3661 and 21 U.S.C. § 850 establish that the district court correctly considered the Sentencing Commission's reports in fashioning a just sentence. The 100:1 ratio was not placed in the Guidelines by Congress; it was incorporated by the Sentencing Commission. Thus, under this Court's precedent, the sentencing court was free to consider the problems engendered by the ratio, as well as other relevant information, in selecting a sentence that would meet the requirement that Congress *did* impose – that a sentence be sufficient but not greater than necessary to fulfill the purposes of § 3553(a). Because the Fourth Circuit's *per se* rule barring consideration of the 100:1 ratio was contrary to statute and precedent and because the rule would make the crack cocaine guideline mandatory in violation of the Sixth Amendment in many cases, the judgment of the court below should be reversed.

A. Both Judicial And Statutory Authority Permit District Courts To Consider Any Information That Is Reliable And Relevant To Sentencing, Even When Such Consideration Results In Disagreement With The Advisory Sentencing Guidelines.

In imposing Mr. Kimbrough's sentence, the district court took into account information establishing that the crack cocaine guideline is unnecessarily harsh and is an

imprecise tool for targeting serious drug offenses. That information came from the Sentencing Commission itself. The Fourth Circuit's rejection of the district court's sentence wrongly prohibits lower courts from considering such information. Both this Court and Congress have consistently stated that there are virtually no limits on the kinds of reliable information a sentencing court may consider.

1. In *Williams v. New York*, 337 U.S. 241 (1949), this Court observed that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246. The Court reaffirmed sentencing courts' "age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence," noting that the value of this practice had only been confirmed by the advance of "modern concepts individualizing punishment." *Id.* at 247, 250-51.

In 1970, Congress codified this "fundamental sentencing principle" by enacting 18 U.S.C. § 3577, which provided that "'[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'" *United States v. Grayson*, 438 U.S. 41, 50 (1978) (quoting 18 U.S.C. § 3577 (1976 ed.)); *see* Pub. L. No. 91-452, Title X, § 1001(a), 84 Stat. 951 (1970). Under § 3577, a sentencing judge could conduct an inquiry that was "'largely

unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Grayson*, 438 U.S. at 50 (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)); *see Roberts v. United States*, 445 U.S. 552, 556 (1980) (reiterating principle).

Shortly after enacting § 3577, Congress enacted a parallel provision in the Controlled Substances Act, 21 U.S.C. § 850. Pub. L. No. 91-513, Title II, § 410, 84 Stat. 1269 (1970). Both statutes use the term "information" rather than "evidence." This word choice, when combined with the inapplicability of the Federal Rules of Evidence to sentencing, *see* Fed. R. Evid. 1101(d)(3), emphasizes the breadth of material that district courts can consider, subject only to its relevance to the sentencing at hand and a due process test of reliability.

Although the Sentencing Reform Act thoroughly overhauled federal sentencing, it left the substance of § 3577 untouched except to recodify it at 18 U.S.C. § 3661. Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1837, 1987. In contrast, another provision of the SRA, 18 U.S.C. § 3553(b)(1), did limit the information that district courts could consider in one situation: deciding whether to depart from the guideline range.

Under § 3553(b)(1), courts were permitted to consider only the Sentencing Guidelines, policy statements, and official commentary of the Commission. 18 U.S.C. § 3553(b)(1) (Supp. 2004). But this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), excised § 3553(b)(1) to make the SRA comply with the Sixth Amendment. *Id.* at 245. As a result of that excision, the "fundamental sentencing principle," *Grayson*, 438 U.S. at 50, under which sentencing courts enjoy broad discretion

to consult various sources and types of reliable and relevant information, has returned to its plenary, pre-Guidelines state. Accordingly, as long as district courts do not go above the applicable statutory maximum or below any mandatory minimum sentence, the sentencing scheme created by Congress leaves the courts free to consider any reliable information that is relevant to their selection of appropriate sentences.

2. While Congress has not placed limits on the kinds of relevant information district courts may consider in sentencing defendants, it has required the consideration of a variety of enumerated sentencing purposes and other factors in 18 U.S.C. § 3553(a). This mandate obligates district courts to consider not only information specific to the offense and the offender, but also information that places the case-specific facts in context with regard to the purposes of sentencing. This information cannot be limited to the bare facts of an individual case.

For example, § 3553(a)(1) requires the court to consider the "nature" of the offense, not just its "circumstances." An offense's "nature" is not a particularized consideration; it is a generic one. *Cf. Roberts*, 445 U.S. at 555 (noting that government's sentencing memorandum "emphasized the tragic social consequences of the heroin trade"). Likewise, § 3553(a)(2) directs that a sentence must "reflect the seriousness of the offense, [] promote respect for the law, and [] provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). These are broad societal goals that encompass both facts that are specific to a defendant's case and more general information, such as empirical studies of the effectiveness of different types of punishments for certain offenses and offenders. Similarly, the directive that the sentence

"afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(B), requires consideration of information beyond the specific case, including information that may relate solely to the community at large. *Cf.* Transcript of Oral Argument 9-10 (Breyer, J.), *Cunningham v. California*, 127 S. Ct. 856 (2007) (observing that a judge might consider a high frequency of breaking-and-entering crimes in the community as a basis for increasing a defendant's sentence to promote general deterrence). To deny district courts the ability to consider information that is directly relevant to these required purposes is to effectively read the language out of the sentencing statute. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

3. This Court's recent sentencing cases underscore these principles. After *Booker*, a sentencing court *must* impose a sentence that is sufficient but not greater than necessary to effectuate the statutory purposes of sentencing after considering the purposes and factors set forth in § 3553(a). A sentencing court must both "consider Guidelines ranges" and "tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-46. In other words, the Sentencing Reform Act now requires district courts "to take account of the Guidelines together with other sentencing goals" set forth in § 3553(a). *Id.* at 249. "[W]ith the mandatory duty to apply the Guidelines excised, the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance." *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005).

Rita v. United States, 127 S. Ct. 2456 (2007), provides further support that sentencing courts may consider a wide array of information. In *Rita*, the Court clarified that

sentencing judges are permitted to disagree with the appropriateness of sentences produced by the Sentencing Guidelines, even when that disagreement might be characterized as grounded in policy considerations. As the Court explained, after a district court determines the advisory guideline range, it "may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply," or "perhaps because the Guidelines sentence *itself* fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." 127 S. Ct. at 2465 (emphasis added). Further, a party may "*contest*[ ] the Guidelines sentence *generally* under § 3553(a) – that is, [she may] argu[e] that the Guidelines reflect an unsound judgment." *Id.* at 2468 (emphasis added). *Rita* thus establishes that a sentencing court may evaluate the soundness of the judgments of the Sentencing Commission as embodied in the Guidelines, and must do so in response to nonfrivolous arguments by either party. *Id.*

The general authority to disagree with guideline assessments has particular relevance in crack cocaine cases. The Commission itself has stated that it no longer believes the 100:1 guideline ratio furthers the purposes of sentencing. It would be a strange rule that allows sentencing courts to evaluate Commission judgments in the Guidelines, but prohibits them from taking into consideration the Commission's public and persistent declaration that the 100:1 ratio is flawed. In other words, this Court has already effectively rejected the Fourth Circuit's conclusion that disagreement with the Guidelines

is an "impermissible factor." *See United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659). The Fourth Circuit's *per se* ban on disagreement with the 100:1 ratio therefore must fail.[5]

In short, Congress and this Court have made plain that sentencing courts are free to consider not just the Guidelines, but all reliable information that is relevant to the imposition of sentences, whether specific to the defendant or general to an offense. The district court in Mr. Kimbrough's case therefore properly considered the

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[5] Further, district courts' consideration of the Commission's reports on the 100:1 ratio in crack cocaine cases is particularly appropriate in light of this Court's rationale for upholding an appellate presumption of reasonableness of a sentence, based upon the "double reliability" of such a sentence. In *Rita*, the Court explained that an appellate presumption is appropriate because "[a]n individual judge who imposes a sentence within the range recommended by the Guidelines . . . makes a decision that is fully consistent with the Commission's judgment in general." 127 S. Ct. at 2465. Put another way, the presumption of reasonableness "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.*

This case presents the analogous situation. The Commission's multiple reports have reached the same conclusion over the past twelve years: that crack cocaine offenses are punished more severely than necessary to meet the purposes of § 3553(a)(2) and do not avoid unwarranted sentence disparities among defendants found guilty of similar conduct. The district court in this case did no more than agree with the Sentencing Commission's well-founded conclusions while remaining within the punishment parameters set by Congress. If a sentence imposed within the guideline range may be presumed reasonable because it accords with the Sentencing Commission's often-unexplained judgment, then a non-guideline sentence that accords with extensively explained findings by the Commission should be deemed at least as reasonable.

Sentencing Commission's reports and recommendations, and the Fourth Circuit erred in concluding otherwise.

B. The Fourth Circuit's Blanket Prohibition On Any Consideration Of The Unwarranted Effects Of The 100:1 Ratio Impermissibly Limits The Discretion Of The District Courts.

The Fourth Circuit's ruling must be reversed because it misapprehends Congress's will with regard to the 100:1 ratio in particular and the federal sentencing scheme in general. If allowed to stand, the appellate court's *per se* rule would place limits on district courts' sentencing discretion that contravene the Sixth Amendment. This Court should therefore reverse the court of appeals's decision and reaffirm the long-standing tradition of appellate deference to the considered judgments of sentencing courts.

1. The Fourth Circuit's *Per Se* Rule Is Based On A Flawed View Of The "Will of Congress."

The Fourth Circuit's *per se* limitation on district courts' discretion in crack cocaine cases hinges on its erroneous belief that the "will of Congress" requires the continued application of the 100:1 ratio in the Sentencing Guidelines. *Eura*, 440 F.3d at 634.[6] The court of appeals

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[6] The other circuits that prohibit district courts from disagreeing with the sentences resulting from the Guidelines' application of the 100:1 ratio likewise base their rulings, in part or *in toto*, on a misperception of congressional will. *See United States v. Pho*, 433 F.3d 53, 62 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 357 (2d

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has taken this view notwithstanding the Guidelines' status as advisory after *Booker* and the Sentencing Commission's repeated acknowledgments that the ratio does not comport with the considerations spelled out in 18 U.S.C. § 3553(a). *See* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 6-8 (May 2007) (hereafter "2007 Report"). The Fourth Circuit's position is incorrect.

The only "will" Congress has expressed as to the 100:1 ratio in crack cocaine cases is that district courts must not sentence below the applicable mandatory minimum terms of imprisonment. Congress has clearly indicated that, for *statutory* purposes, the punishment for offenses involving 50 or more grams of crack cocaine is to be equal to that for offenses involving 5,000 grams of powder cocaine. *See* 21 U.S.C. § 841(b)(1)(A), (B). Congress did not direct the Sentencing Commission to use that ratio when creating the Sentencing Guidelines generally or the drug quantity table in particular. *See* ADAA, Pub. L. No. 99-570, 100 Stat. 3207, 3207-2–3207-5 (1986).

Nor has Congress directed the Sentencing Commission to *retain* the 100:1 ratio in the Sentencing Guidelines, although it has directed the Commission to

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Cir. 2006); *United States v. Ricks*, ___ F.3d ___, 2007 WL 2068098, at *4 (3d Cir. 2007); *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007), *petition for cert. filed* June 21, 2007 (U.S. No. 06-12046); *United States v. Jointer*, 457 F.3d 682, 686 (7th Cir. 2006), *petition for cert. filed* Oct. 27, 2006 (U.S. No. 06-7600); *United States v. Spears*, 469 F.3d 1166, 1177-78 (8th Cir. 2006), *petition for cert. filed* Mar. 2, 2007 (U.S. No. 06-9864); *United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir.), *reh'g denied*, 472 F.3d 835 (11th Cir. 2006).

revise sentencing for other types of drugs in specific ways.[7] To the extent Congress has expressed its views on the 100:1 *guideline* ratio, it has authorized consideration of alternative approaches. Even when, in 1995, Congress rejected the Commission's proposal to equalize crack and powder cocaine in the drug quantity table, it specifically ordered the Commission to further consider the issue. Pub. L. No. 104-38, § 2, 109 Stat. 334 (1995) (directing Commission to recommend changes to statutes and Sentencing Guidelines governing cocaine offenses and to propose a ratio "consistent with the ratios set for other drugs and consistent with the objectives set forth in" 18 U.S.C. § 3553(a)); *see* H.R. Rep. No. 104-272, at 4 (1995) (acknowledging that "[w]hile the evidence clearly indicates that there are significant distinctions between crack and powder cocaine that warrant maintaining longer sentences for crack-related offenses, it should be noted that the current 100-to-1 quantity ratio may not be the appropriate ratio"), *reprinted in* 1995 U.S.C.C.A.N. 335, 337.

In light of Congress's actions, the Fourth Circuit was wrong in concluding that Congress intended, let alone decreed, that the treatment of crack cocaine in the Sentencing Guidelines must mirror its treatment in the mandatory minimum statute.[8] All that can be said is that

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[7] *E.g.*, U.S.S.G. App. C, amend. 609 (implementing directive to increase penalties for ecstasy offenses); U.S.S.G. App. C, amend. 610 (implementing congressional directive to increase penalties for amphetamine offenses); U.S.S.G. App. C, amend. 667 (implementing directive to increase penalties for gammahydroxybutyric acid offenses); U.S.S.G. App. C, amends. 681, 688 (implementing directive to increase penalties for offenses involving anabolic steroids); *see generally* Fifteen Year Report, App. B (listing congressional directives to Commission).

[8] In fact, the Sentencing Commission has recently demonstrated that it is possible for the drug offense guidelines to respect the

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Congress intended for a defendant convicted of certain crack cocaine offenses to be sentenced to no fewer than ten years in prison. The district court complied with this directive in Mr. Kimbrough's case.

2. The Fourth Circuit's *Per Se* Rule Contravenes § 3553(a) By Improperly Elevating The Crack Cocaine Guideline Over The Parsimony Provision And The Statutory Considerations Other Than The Guideline Range, And By Incorrectly Equating Avoidance Of Unwarranted Disparity With Adherence To The Guidelines.

Even if Congress *had* directed the Guidelines to reflect the 100:1 ratio, the Fourth Circuit erred by holding that disagreement with the crack cocaine guideline is *per se* unreasonable. Section 3553(a) directs the sentencing court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing set out in § 3553(a)(2). Selection of a sentence in accordance with the parsimony provision is guided by the listed purposes and is to be made after consideration of enumerated factors, one of which is the sentencing range set by the Guidelines. The language and the structure of § 3553(a) place these considerations on an even footing, subject to the parsimony provision. The Fourth Circuit's

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mandatory minimum sentences in 21 U.S.C. § 841(b)(1) while using ratios in the drug quantity table lower than 100:1. *See* U.S. Sentencing Comm'n, *Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2007*, 72 Fed. Reg. 28,558, 28,571-73 (2007).

per se rule prohibiting disagreement with the 100:1 ratio runs contrary to the statutory framework. The rule stresses the crack cocaine guideline over the other § 3553(a) considerations, and it incorrectly equates the consideration of unwarranted sentence disparity with a need to pursue uniformity through the Guidelines.

1. The ultimate command of § 3553(a) is that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth" in § 3553(a)(2). Thus, if any one of § 3553(a)'s considerations is to be elevated over others, it is the purposes set forth in (a)(2), for they are also incorporated directly into the parsimony provision. *See also* 18 U.S.C. § 3551 (directing that defendants are to be sentenced "so as to achieve the purposes set forth in subsections (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case").

Aside from that organizing principle, the statute does not require the sentencing court to consider the purposes and other factors set forth in § 3553(a) in any particular order, or to give more weight to the guideline range than to the other factors. *See* 18 U.S.C. § 3553(a) (directing that "[t]he court, in determining the particular sentence to be imposed, shall consider" the factors that follow); *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part) (stating that "[t]he statute provides no order of priority among all th[e] factors"); *United States v. Pickett*, 475 F.3d 1347, 1353 (D.C. Cir. 2007). Instead, the statute sensibly contemplates that a district court will exercise its discretion and weigh the considerations as it deems appropriate in the context of specific cases. If tension arises among the considerations applicable in particular

cases, resolution of that tension is left to the district court, and the appellate court should reverse only if the district court's decision has no reasoned basis to support it. *See Rita*, 127 S. Ct. at 2464 (observing that "different judges (and others) can differ as to how best to reconcile the disparate ends of punishment"); *id.* at 2468 (discussing need for sentencing court to provide statement of reasons).

Section 3553(a) assigns to the sentencing judge, not the court of appeals, the responsibility to balance sentencing purposes alongside other statutory considerations relevant in the particular case when deciding upon the appropriate sentence. *See Rita*, 127 S. Ct. at 2463. In the context of a case involving crack cocaine, a district court not only may, but should, conduct its own evaluation of the 100:1 ratio, and the court of appeals erred in concluding differently.

2. In addition to elevating the Guidelines over other § 3553(a) considerations and the statute's ultimate mandate to impose a parsimonious sentence, the Fourth Circuit misinterpreted § 3553(a)(6), which directs the sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The Fourth Circuit opined that allowing a sentencing court to consider information demonstrating that the 100:1 ratio causes unwarranted disparity would increase, rather than decrease, unwarranted disparity. It speculated that consideration of the fact that the 100:1 ratio results in sentences for crack cocaine defendants that are greater than necessary to satisfy the statutory purposes of sentencing would somehow lead to judges using "their own personal ratio preferences," and that this would

"inevitably result in an unwarranted disparity between similarly situated defendants." *Eura*, 440 F.3d at 633. The Fourth Circuit was wrong on each count.

First, the Fourth Circuit's approach assumes that all offenses involving crack cocaine must be punished identically. But § 3553(a)(6) refers to "similar conduct," not "identical offenses," and to the avoidance of "unwarranted sentence disparities," not to the imposition of "identical sentences." The term "similar conduct" is broad enough to include all drug offenses, and certainly is broad enough to permit a sentencing court to conclude that a defendant convicted of a drug offense involving crack cocaine has been found guilty of conduct similar to that of a defendant convicted of an offense involving powder cocaine. A district court's considered judgment that crack and powder cocaine offenses constitute "similar conduct" is thus just as reasonable as – if not more reasonable than – a court's decision to rigidly adhere to the Guidelines. If two views are each rational, then adopting either one cannot be an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400-01 (1990) (discussing deferential review of findings when there are "two permissible views of the evidence"; declared to be "indistinguishable" from abuse of discretion standard), *cited with approval in Koon v. United States*, 518 U.S. 81, 99 (1996); *see also Rita*, 127 S. Ct. at 2471-72.

Second, it is up to the sentencing court to determine, through a reasoned analysis of all the § 3553(a) considerations, whether a sentence different from that suggested by the Guidelines creates a disparity that is warranted or unwarranted. "Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take

into account differences among offenders that are relevant to our purposes and priorities." Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker: *More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 Ariz. St. L.J. 425, 442 (2006). If different sentences for similar conduct result from a sentencing court's considered application of § 3553(a), that difference cannot be unwarranted. Rather, it simply demonstrates that the statute is operating as designed, with a sentencing court exercising its informed discretion to determine an appropriate sentence in light of the purposes of sentencing as applied in the individual case. Put another way, it cannot be that a provision that seeks to avoid unwarranted disparity may be interpreted to sanction acknowledged unwarranted disparity. The Fourth Circuit's interpretation of § 3553(a)(6) would divorce the text from its very purpose. *See* Brief of Senators Edward M. Kennedy, Orrin G. Hatch, & Dianne Feinstein as *Amici Curiae* in Support of Respondent, at 29, *Claiborne v. United States*, No. 06-5618 ("It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, and as a result has undermined public confidence in the criminal justice system. Such sentencing disparity is completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing.") (internal citation omitted).

Third, while the Fourth Circuit speculated that judges would use "personal ratio preferences" to recalculate guideline ranges, that did not occur in this case. The district court used the 100:1 ratio to calculate the guideline range; it then proceeded to consider the

information before it and the statutorily identified purposes of sentencing to determine that the guideline sentence was greater than necessary.[9] *Rita* makes clear that this procedure was correct. The sentencing court is to calculate the guideline range using the Sentencing Commission's Guidelines. 127 S. Ct. at 2465. A sentencing court is free, once it has calculated the guideline range, to disagree with the policy reflected therein and reach a sentence other than that suggested by the Guidelines. *See id.* at 2465, 2468. There is no danger of "personal ratio preferences" causing unwarranted disparities, or any valid reason to prohibit sentencing courts from considering the reports of the Commission showing that the 100:1 ratio itself generates unwarranted disparity.

Fourth, the statutory scheme provides assurance that allowing a sentencing court to consider relevant information about the 100:1 ratio will not "inevitably result in [] unwarranted disparity." *Eura*, 440 F.3d at 633.

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[9] In the past, some district courts have revised the 100:1 ratio and used the revised ratio to calculate a new advisory guideline range. This practice may be inconsistent with § 3553(a)(4), but it will not happen following *Rita*, and it did not happen here. Because it did not happen in this case, Mr. Kimbrough's case stands in contrast to others. *See United States v. Pho*, 433 F.3d 53, 58, 59 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 343 (2d Cir. 2006); *United States v. Ricks*, ___ F.3d ___, 2007 WL 2068098, at *1 (3d Cir. 2007); *United States v. Eura*, 440 F.3d 625, 631 n.6 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659); *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007), *petition for cert. filed* June 21, 2007 (U.S. No. 06-12046); *United States v. Jointer*, 457 F.3d 682, 685 (7th Cir. 2006), *petition for cert. filed* Oct. 27, 2006 (U.S. No. 06-7600); *United States v. Spears*, 469 F.3d 1166, 1169 (8th Cir. 2006), *petition for cert. filed* Mar. 2, 2007 (U.S. No. 06-9864); *see also United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) (in dicta, noting that district court cannot substitute its own ratio in place of 100:1 ratio).

The commands of § 3553(a) serve to generally guide district courts' discretion. The parsimony provision places an upper limit on courts' discretion, and § 3553(a)(4)'s requirement that district courts consider the advisory guideline range further focuses that discretion. So, too, do the statutory requirements that the sentencing court impose a sentence that constitutes just punishment in light of the seriousness of the offense, provides sufficient deterrence, sufficiently protects the public, ensures needed treatment in the most effective manner, and promotes respect for the law. In weighing the § 3553(a) considerations and stating its reasons for the sentence imposed, *see* 18 U.S.C. § 3553(c), the sentencing court will explain why a sentence other than that recommended by the Guidelines is, albeit a different sentence, not one reflecting unwarranted disparity.[10]

Finally, even if some differences could result from this process, this Court has recognized that if guidelines-based sentencing is to comply with the Sixth Amendment, strict uniformity must give way. *Booker*, 543 U.S. at 263. District courts cannot violate the command of § 3553(a) to impose a sentence sufficient but not greater than necessary to meet the purposes of sentencing by imposing sentences that are greater than necessary simply to promote uniformity. Put another way, there may now be more

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[10] In any event, in a crack cocaine case, it would appear difficult for a sentencing court to vary to any significant degree from the guideline sentence, although doing so would correct, rather than create, unwarranted disparity. According to the Sentencing Commission's statistics, over 70% of crack offenders will start at base offense levels that are either at the mandatory minimum levels (base offense 26 or 32) or only one level up (base offense level 28 or 34). *See* 2007 Report at 25; U.S.S.G. § 2D1.1(c).

non-guideline sentences, but less true disparity. Hofer, *supra*, at 456-57, 462. The Fourth Circuit erred in concluding otherwise.

3. If Allowed To Stand, The Fourth Circuit's *Per Se* Rule Would Unconstitutionally Constrain The District Courts' Discretion In Crack Cocaine Cases In Violation Of *Booker* And The Sixth Amendment.

Booker is clear: either the Sentencing Guidelines are advisory or they are unconstitutional. The Fourth Circuit has developed a rule of appellate review of sentences in crack cocaine cases – *per se* unreasonableness – that ignores this rule and effectively reinstates the mandatory nature of the guideline applicable to those cases. In other words, by forbidding disagreement with the crack cocaine guideline except in an atypical case, the appellate court has made the guideline mandatory again.[11] The Fourth

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[11] The Fourth Circuit has done this by claiming, on the one hand, that "[not] *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range," while decreeing, on the other hand, that "a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the factors listed in 18 U.S.C. § 3553(a)." *Eura*, 440 F.3d at 634 (emphasis in original). Applying this rule in Mr. Eura's case, the Fourth Circuit found nothing "atypical" to justify a sentence outside the advisory guideline range. *Id.* There is no practical difference between this language and the statutory provision that *Booker* excised in order to render the Guidelines constitutional. *Booker*, 543 U.S. at 245; *see* U.S.S.G. Ch. 1, Pt. A.2 (Nov. 2002 ed.) ("Pursuant to the [SRA], the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents *atypical* features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range.") (emphasis added) (citing 18 U.S.C. § 3553(b)); *see also id.* Ch. 1, Pt. A.4(b) ("The Commission intends the sentencing

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Circuit's rule has thereby reinstated the precise constitutional defect identified by this Court in *Booker*. *See* 543 U.S. at 230-44.

According to the Fourth Circuit, "a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." J.A. 98. This rule is so strict that the Fourth Circuit was "constrained to vacate [Mr.] Kimbrough's sentence" even though it acknowledged that the district court's sentence was based only "in part" on disagreement with the applicable guideline range. *Id.* at 97, 98. Such a *per se* standard of review creates a *de facto* mandatory guideline range in violation of the rule announced in *Booker*. *See* 543 U.S. at 234 (recognizing that although in theory, a district court has the ability to depart from the Guidelines, "[i]mportantly, . . . departures are not available in every case, and in fact are unavailable in most"); *see also Rita*, 127 S. Ct. at 2467 (stating that "[e]ven the Government concedes that appellate courts may not presume that every variance from the advisory Guidelines is unreasonable").

If the Fourth Circuit's *per se* rule is allowed to stand, the drug guideline, as applied in crack cocaine cases, must fall as unconstitutional. But this Court has already held that it will avoid such a result by requiring the Guidelines to be treated as advisory, as simply one piece of the overall

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courts to treat each guideline as carving out a 'heartland,' a set of *typical* cases embodying the conduct that each guideline describes. When a court finds an *atypical* case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.") (emphasis added).

statutory sentencing scheme. *Booker*, 543 U.S. at 245-46. The constitutional problem is further avoided by interpreting § 3553(a) to place each of the seven sentencing considerations on an equal footing with one another – in short, to make the Guidelines not merely "effectively advisory," *id.* at 245, but "*truly* advisory." *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring) (emphasis added); *see also id.* at 2465 (refusing to apply presumption of reasonableness of within-range sentence to district courts' determination of appropriate sentence under § 3553(a) in first instance). Because the Fourth Circuit's *per se* rule of appellate review raises serious constitutional problems by returning sentencing procedures in crack cocaine cases to a pre-*Booker* framework, the doctrine of constitutional avoidance requires that it be rejected. *Jones v. United States*, 526 U.S. 227, 229, 239-40 (1999); *see also INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

4. The Fourth Circuit's *Per Se* Rule Is Inconsistent With The Deference Owed To District Courts' Considered Sentencing Judgments.

Vacating the Fourth Circuit's *per se* reversal will not merely reflect a correct interpretation of the federal statutes and avoid constitutional concerns. It will also reaffirm the deference that this Court and Congress contemplated would be afforded district courts' sentencing judgments under an abuse-of-discretion standard of review. Instead of using the Guidelines as a presumptive benchmark, such review allows the appellate courts to consider each non-guideline sentence on its own terms.

1. Deference to the considered judgment of sentencing courts is a theme that traverses and unites this Court's sentencing jurisprudence. During the pre-Guidelines era of almost unfettered sentencing discretion, this Court explained that "[i]ndisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law is judicial," and that "it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority." *Ex parte United States*, 242 U.S. 27, 41-42 (1916); *see also Williams v. New York*, 337 U.S. 241, 247 (1949) (a sentencing judge's "task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been decided").

Neither the Sentencing Reform Act nor the Guidelines were intended to eliminate judicial discretion in sentencing. As stated in the Senate Judiciary Committee report, "[t]he sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decisions on the appropriate sentence." S. Rep. No. 98-225, at 51. Nor was it Congress's intent "that the guidelines be imposed in a mechanistic fashion" that would "eliminate the thoughtful imposition of individualized sentences." *Id.* at 52. Further, although the SRA provided for appellate review of sentences, that review was intended to "follow[] the principle" that a district court's discretion in sentencing "should not be displaced by the discretion of an appellate court." *Id.* at 150.

This Court has repeatedly recognized that Congress intended that district courts retain discretion in sentencing. *Koon v. United States*, 518 U.S. 81, 97 (1996) (observing that Congress "manifest[ed] an intent that district courts retain much of their traditional sentencing discretion"); *see Rita*, 127 S. Ct. at 2472 (Stevens, J., concurring) (recognizing that "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence") (internal quotations omitted) (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992)). Indeed, Congress recognized "that sentencing has been and should remain 'primarily a judicial function'" when it decided to place the Sentencing Commission within the Judicial Branch of government. *Mistretta v. United States*, 488 U.S. 361, 390 (1989) (citation omitted). Such deference is driven in part by the "institutional advantage" that a district court enjoys in imposing sentences "informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98.

After *Booker* and *Rita*, appellate deference to district courts' sentencing decisions is greater than it was when the Guidelines were mandatory. In *Booker*, the Court struck a portion of the appellate review statute then in effect, 18 U.S.C. § 3742(e), because the excised language "ma[d]e Guidelines sentencing even more mandatory than [before]." *Booker*, 543 U.S. at 261. To replace what it had excised, the Court looked to language that had been in § 3742 as originally enacted by the Sentencing Reform Act. *See id.* (setting out language). As the Court summarized the earlier provision, "the text told appellate courts to determine whether the sentence 'is unreasonable' with

regard to § 3553(a)." *Id.* Further, "[s]ection 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable." *Id.* Thus, not only did *Booker* make the Sentencing Guidelines advisory, it made district courts' sentencing decisions reviewable only for "unreasonableness." *Id.* at 245, 260-61. *Rita* clarified that "appellate 'reasonableness' review merely asks whether the trial court abused its discretion." *Rita*, 127 S. Ct. at 2465; *see Booker*, 543 U.S. at 260, 262 (citing earlier cases employing abuse of discretion standard).

Under the deferential abuse of discretion standard, the considered judgment of a district court that is based on reliable information relevant to the sentence imposed should not be subject to reversal. *See Rita*, 127 at 2468-69; 18 U.S.C. § 3661; 21 U.S.C. § 850. Appellate review does not permit reversal simply because the court of appeals would have imposed a different sentence. *See, e.g., Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring) ("Although I would have imposed a lower sentence had I been the District Judge, I agree that he did not abuse his discretion in making the particular decision that he did.").[12] The Fourth Circuit's *per se* prohibition fails to accord the

[12] This is not to say that a district court's discretion is unlimited. To the contrary, a district court would abuse its discretion if it used information that was not reliable or that was not relevant to its sentencing determination, such as a defendant's allegiance to a particular baseball team. *See Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring); *id.* at 2483 n.6 (Scalia, J., concurring). Also, as *Rita* directs, "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 2468.

deference this Court's precedents require. The Fourth Circuit's rule improperly elevates its own view of sentencing preferences (application of the Guidelines and uniformity as measured by the Guidelines) at the expense of the considered judgment of a sentencing court. Because the *per se* rule is contrary to statute and precedent, it cannot be sustained.

2. The Fourth Circuit's rule conflicts with *Booker* in another way as well. It distorts reasonableness review by tying appellate review of sentences directly to the applicable guideline range. Rather than asking whether the *sentence* is reasonable, as this Court contemplated in *Booker*, 543 U.S. at 260-61, it effectively asks whether the *departure* or *variance* is reasonable. *See* J.A. 98. The court of appeals's rule thereby establishes the baseline for reasonableness as the guideline range, and presumes all other sentences to be unreasonable absent additional fact-finding and explanation. This is the manner in which courts of appeals reviewed departures under the mandatory Guidelines, pursuant to the excised 18 U.S.C. § 3742(e) (*de novo* review of, *inter alia*, whether "the sentence departs to an unreasonable degree from the applicable guidelines range"), but it is plainly not the proper standard for assessing whether the sentence as a whole is reasonable. *See Rita*, 127 S. Ct. at 2473-74 (Stevens, J., concurring). That inquiry cannot be tied to the Guidelines range.[13]

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[13] Like the excised provision, subsection (f) of the statute currently in effect provides that a court of appeals shall remand a case for resentencing if it determines that the "the sentence is outside the applicable guideline range and the ... departure is based on an impermissible factor, or is to an unreasonable degree," 18 U.S.C.

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II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN SENTENCING DERRICK KIMBROUGH TO 180 MONTHS IN PRISON AFTER CONSIDERING THE 100:1 RATIO.

The district court considered the factors identified for its consideration under § 3553(a) that were relevant to Mr. Kimbrough's case, it imposed the sentence that it found to meet the parsimony provision, and it gave a reasoned explanation for its decision. Instead of deferring to the district court, the Fourth Circuit reversed the sentence as *per se* unreasonable because the district court concluded that a sentence premised on the 100:1 powder/crack ratio incorporated in the Sentencing Guidelines was greater than necessary under § 3553(a). The appellate court should not have reversed the sentence as the district court acted well within its discretion in sentencing Mr. Kimbrough as it did.

A. The District Court Was Within Its Discretion In Considering The Sentencing Commission's Reports Because They Were Both Reliable And Relevant To The Court's Sentencing Decision.

In sentencing Mr. Kimbrough, the district court appropriately exercised its discretion to consider the reports prepared by the Sentencing Commission in regard

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§ 3742(f)(2), although the "degree" of departure is not explicitly tied to the guideline range in subsection (f)(2), as it is in subsection (e)(3)(C). This provision, like the excised provisions of subsection (e), assumes that the Guidelines are mandatory and, as Justice Scalia noted in *Rita*, can no longer be considered valid. 127 S. Ct. at 2483-84 (Scalia, J., concurring).

to the 100:1 ratio for two reasons. First, the information was authoritative and reliable. Second, the research and recommendations contained in the reports informed several of the § 3553(a) factors that the district court was required to consider.

1. The Commission's reports are both authoritative and reliable. Congress delegated substantial authority to the Commission to set sentencing policy in accordance with the purposes of sentencing enacted in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. §§ 991(b)(1), 994(c), (f). The reports at issue are statutorily authorized. 28 U.S.C. § 995(a)(20); *see id.* § 995(a)(12)-(16). Because Congress created the Commission to act as an expert body on sentencing matters, its reports can be particularly relevant and useful to district courts at sentencing. *See Mistretta v. United States*, 488 U.S. 361, 379 (1989) (stating that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate"). And the Commission's expertise enhances the likelihood that the reports will be reliable. The reports considered in this case were issued over the course of twelve years after extended review of a great deal of research, and they consistently reached the same conclusions.

2. The Commission's reports are also relevant. They illuminate, for example, the district courts' consideration of the advisory sentencing range because they demonstrate that the Sentencing Commission has reconsidered its own guideline and has forthrightly stated that the advisory ranges in crack cocaine cases are too high. *See* 18 U.S.C. § 3553(a)(4).

The reports also demonstrate that rigid application of the 100:1 ratio within the drug guideline fails to meet the purposes of sentencing in several ways. *See* 18 U.S.C. § 3553(a)(2). First, unyielding application of the 100:1 ratio does not appropriately reflect the seriousness of the offense or the needs for deterrence or incapacitation because the ratio overstates the culpability of crack defendants generally. In 1986, when Congress instituted the 100:1 ratio for statutory mandatory minimums, one of the primary reasons offered for the differential was an assumption that high levels of violence were associated with crack cocaine trafficking; likewise, it was widely assumed that many crack cocaine offenses involved distribution to minors or pregnant women. These assumptions, however, have proven unfounded. *See, e.g.*, 2002 Report at vi, vii, 91, 94-96. Thus, application of the 100:1 ratio punishes crack cocaine defendants for circumstances that are not present in most cases. *See id.* at 95-96. And in the cases where the circumstances *are* present, application of the 100:1 ratio results in double-counting because those defendants will be punished for those circumstances both as they are reflected in the base offense level under the drug guideline and in the application of additional upward adjustments. *E.g.*, U.S.S.G. § 2D1.1(b)(1) (two-level increase for possession of weapon); *see* 18 U.S.C. § 3553(a)(4). Punishment that reaches beyond the crime committed overstates the seriousness of the offense, as well as the need for incapacitation and deterrence.

Nor is respect for the law engendered when punishment misses its target. The Commission's reports establish that while the five- and ten-year mandatory minimum penalties were created to apply to "serious" and

"major" traffickers, in fact, the majority of crack cocaine defendants are smaller-scale, street-level dealers like Mr. Kimbrough. 2002 Report at vi-vii, 5-9, 99. That is, the 100:1 ratio disproportionately impacts far more low-level traffickers than it does the intended targets of the ratio – the mid- and high-level traffickers who distribute the powder that is turned into crack.

Finally, punishment that disproportionately affects minorities undermines respect for the law. An unintended consequence of the ratio's impact on street-level crack cocaine dealers has been that longer sentences are imposed disproportionately on minorities, and in particular, African-Americans, because they make up the great majority of federal crack cocaine defendants. *See* 1995 Report at 156, 161; 2002 Report at 34-35, 62, 102-03. As the Sentencing Commission has concluded, "The 100-to-1 . . . ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants." 1995 Report at 163; *see* 2002 Report at 102-03. Even though the drug guideline is not designed deliberately to sentence minorities more harshly, the fact remains that in practice it does when crack cocaine cases are at issue. The practice of meting out punishment that is harsher to one group than another corrodes belief in equal justice under the law. *See* 2002 Report at 103.

For all these reasons, the district court was permitted to, and properly did, consider the Commission's reports in performing its required tasks under § 3553(a).

B. The District Court Did Not Abuse Its Discretion In Imposing A Sentence Of 180 Months.

The Commission's reports and their impact on the § 3553(a) factors warranted a sentence below that called for by the advisory Guidelines. The district court did not, however, rest its sentence only upon its consideration of the Commission's reports describing the problems with the 100:1 ratio. Rather, after considering the arguments of counsel, the court considered all of the relevant sentencing purposes and factors in § 3553(a), and linked them to the evidence and information before it. *See Rita*, 127 S. Ct. at 2465, 2468-69.

The court considered the nature and circumstances of the offense, noting that it involved powder cocaine as well as crack cocaine. J.A. 72; 18 U.S.C. § 3553(a)(1). The court considered Mr. Kimbrough's history and characteristics, observing that he had never been convicted of a felony or served any time in prison and that his criminal record consisted only of traffic and small-time drug offenses. *Id.* at 73; *see* Sealed J.A. 137; 18 U.S.C. § 3553(a)(1). The court also considered Mr. Kimbrough's steady work history and his honorable military service. J.A. 73-74. Further, the district court considered the types of sentences available when it recognized that it was bound by the mandatory minimums set forth in 21 U.S.C. § 841(b)(1)(A) and 18 U.S.C. § 924(c). J.A. 74-75; *see* 18 U.S.C. § 3553(a)(3). Finally, the district court appropriately considered whether imposition of the sentence suggested by the advisory Guidelines would create "unwarranted sentence disparities among defendants with similar records who

have been found guilty of similar conduct" in light of the 100:1 ratio.[14] J.A. 72, 74; *see* 18 U.S.C. § 3553(a)(6).

After discussing the relevant considerations in § 3553(a) in light of the information in the presentence report about Mr. Kimbrough and the offense along with the § 3553(a) considerations the Guidelines do not take into account, the court reiterated that, "should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case." J.A. 74; *see* J.A. 72-74. Finally, in imposing a sentence of 180 months upon Mr. Kimbrough, the court observed, "That's 15 years, which is clearly long enough under the circumstances." J.A. 74; *cf.* 18 U.S.C. § 3553(a) (sentence to be sufficient but not greater than necessary).

In sum, the district court applied the correct legal standard for measuring the length of sentence to impose upon Mr. Kimbrough, considered both the advisory guideline range and the other § 3553(a) factors and purposes of sentencing, and explained its reasons for imposing the sentence that it did. That sentence fell within the statutorily prescribed range. Accordingly, the sentence imposed by the district court was reasonable. The Fourth Circuit should have deferred to the district court's judgment.

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[14] Because this case does not raise any issue as to restitution, the district court committed no error by not addressing the final consideration included in § 3553(a). *See* 18 U.S.C. § 3553(a)(7).

CONCLUSION

For the above-stated reasons, the Court should reverse the decision of the Fourth Circuit with instructions to affirm the judgment of the district court.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed -

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines -

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement -

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.[2] -

(1) In General. - Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a

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[1] So in original. The period probably should be a semicolon.

[2] This provision was excised by *United States v. Booker*, 543 U.S. 220, 245 (2005).

kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

* * *

(c) Statement of reasons for imposing a sentence. - The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence -

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in

camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * *

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18 U.S.C. § 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

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[3] So in original. The second comma probably should not appear.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving -

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a

detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such

term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving -

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances

referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of

such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved

drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any

person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

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21 U.S.C. § 850. Information for sentencing

Except as otherwise provided in this subchapter or section 242(a) of title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.

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28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more

than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to -

(1) establish sentencing policies and practices for the Federal criminal justice system that -

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

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28 U.S.C. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System -

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including -

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of -

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b) (1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each

category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[4] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance -

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

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[4] So in original. Probably should be "incidence."

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[5] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance -

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

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[5] So in original. Probably should be "incidence."

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might

become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and -

(1) has been convicted of a felony that is -

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is -

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant -

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect -

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of -

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is

consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect,

including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including -

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such

defendant, on the basis of changed circumstances unrelated to the defendant, including changes in -

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) (1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information

regarding factors made relevant by the guidelines. The report shall also include –

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted

the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

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(7)

No. 06-6330

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In the Supreme Court of the United States

DERRICK KIMBROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in sentencing a defendant convicted of trafficking crack cocaine, a district court may reduce the defendant's sentence based on its disagreement with the 100:1 ratio adopted by Congress and implemented in the Sentencing Guidelines for calculating sentences for trafficking crack and powder cocaine.

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In the Supreme Court of the United States

No. 06-6330

DERRICK KIMBROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 96-98) is not published in the Federal Reporter, but is reprinted at 174 Fed. Appx. 798.

JURISDICTION

The judgment of the court of appeals (J.A. 99) was entered on May 9, 2006. A petition for rehearing was denied on June 6, 2006 (J.A. 100). The petition for a writ of certiorari was filed on September 5, 2006 (a Tuesday following a holiday), and was granted on June 11, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-52a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to distribute cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(iii) and (b)(1)(C), and 846; possessing 50 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c). Although petitioner's range on the drug counts under the United States Sentencing Guidelines (Sentencing Guidelines or Guidelines) was 168 to 210 months of imprisonment, the district court imposed the statutory minimum sentence of 120 months on the crack-cocaine counts, in part based on its disagreement with the disparity in sentences for trafficking crack and powder cocaine. The court sentenced petitioner to a total of 180 months of imprisonment, to be followed by five years of supervised release. The court of appeals vacated the sentence and remanded for resentencing. J.A. 96-98.

A. Background

1. In 1970, Congress passed the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, which repealed most prior drug laws and established a comprehensive

federal scheme to regulate the market in drugs generally, including cocaine. See *Gonzales* v. *Raich*, 545 U.S. 1, 10-14 (2005). The CSA classified drugs by schedules, according to their effects and potential for abuse; cocaine was classified as a Schedule II drug. As originally enacted, the CSA established penalties for illegal drug trafficking that were generally based on the type (but not the quantity) of drugs involved. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 201-202, 401, 84 Stat. 1245-1252, 1260-1262. In 1984, Congress modified the CSA's penalty structure to add drug quantity as a factor; Congress did so by establishing quantities of specific drugs that would trigger enhanced penalties. For cocaine, the triggering quantity was one kilogram, which increased the maximum sentence from 15 to 20 years of imprisonment. See Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. V, 98 Stat. 2068 (21 U.S.C. 841(b)(1) (Supp. II 1984)).

2. By the early 1980s, the principal form of illegal cocaine in the United States was powder cocaine, which is produced by dissolving coca paste in hydrochloric acid and water. Users typically consume powder cocaine by snorting it through the nose. In the 1980s, however, another form of cocaine, crack cocaine, became increasingly common. Crack cocaine is usually produced by boiling powder cocaine in a solution of sodium bicarbonate and water, resulting in a solid "rock" of purer cocaine. Users typically consume crack cocaine by smoking it; because smoking ordinarily produces more immediate (and intense) effects than snorting, crack is thought to present a higher risk of addiction and personal deterioration than powder. See United States Sentencing Commission, *Report to the Congress: Co-*

caine and Federal Sentencing Policy 62-67 (2007) (2007 Report) <www.ussc.gov/r_congress/cocaine2007.pdf>; United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 9-14 (1995) (1995 Report) <www.ussc.gov/crack/exec.htm>.

In 1986, Congress passed the Anti-Drug Abuse Act (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207. The 1986 Act substantially increased the penalties for the trafficking of controlled substances and, as is relevant here, established a three-tier penalty system for certain drugs, based on the quantity of the distributed substance. At the lowest quantity for each drug, the Act establishes a maximum sentence of 20 years of imprisonment for a first-time offender. See 21 U.S.C. 841(b)(1)(C). Once the amount of the drug reaches a designated threshold, the Act establishes a minimum sentence of five years and a maximum of 40 years. See 21 U.S.C. 841(b)(1)(B). And once the amount of the drug reaches a second threshold (which is set at ten times the first threshold), the Act establishes a minimum sentence of ten years and a maximum of life. See 21 U.S.C. 841(b)(1)(A). The Act specifies different threshold quantities for various drugs. See 21 U.S.C. 841(b)(1)(A)(i)-(viii) and (b)(1)(B)(i)-(viii).

In the 1986 Act, Congress distinguished for the first time between trafficking crimes involving crack and powder cocaine, and determined that crimes involving crack should be subject to considerably more severe penalties. See 21 U.S.C. 841(b)(1)(A)(ii)-(iii) and (b)(1)(B)(ii)-(iii). As the United States Sentencing Commission (Sentencing Commission or Commission) has explained, the legislative history of the 1986 Act indicates that Congress believed that crack cocaine was at

the forefront of the national drug epidemic. In addition, the legislative history reflects that Congress concluded that crack cocaine was more dangerous than powder cocaine, on the grounds that (1) crack was extremely addictive (and more addictive than powder); (2) crack was more closely correlated with the commission of other serious crimes; (3) crack had particularly serious physical effects; (4) crack was particularly likely to be used by young people; and (5) the use of crack was particularly likely to expand, in light of its potency, cost, and ease of distribution and use. See United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 9-10 (2002) (2002 Report)<www.ussc.gov/r_congress/02crack/2002crackrpt.pdf>; 1995 Report 116-118.

Accordingly, in establishing the three-tier penalty system, the 1986 Act used different quantities for "cocaine" (*i.e.*, powder cocaine) and "cocaine base" (*e.g.*, crack cocaine) to establish enhanced sentences.[1] In setting the quantities of each type of cocaine required to trigger higher sentencing ranges, the Act used a 100:1 ratio of powder to crack cocaine: thus, the first threshold (for a sentence of five to 40 years) was set at 500 grams of powder but 5 grams of crack, see 21 U.S.C. 841(b)(1)(B)(ii)-(iii), and the second threshold (for a sen-

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[1] While not defined in the 1986 Act, the phrase "cocaine base" plainly includes crack cocaine, which is by far the most commonly trafficked form of cocaine in its chemically base form. See 1995 Report 13-14; *United States* v. *Pho*, 433 F.3d 53, 54 n.1 (1st Cir. 2006). The courts of appeals are divided on whether "cocaine base" reaches other types of cocaine in base form besides crack. Compare, *e.g.*, *United States* v. *Barbosa*, 271 F.3d 438, 461-467 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002), with *United States* v. *Edwards*, 397 F.3d 570 (7th Cir. 2005).

tence of ten years to life) was set at 5 kilograms of powder but 50 grams of crack, see 21 U.S.C. 841(b)(1)(A)(ii)-(iii). In adopting the 100:1 ratio, Congress considered but rejected bills that used lower ratios, including 50:1 and 20:1. See 2002 Report 7-8; 1995 Report 117; *United States* v. *Castillo*, 460 F.3d 337, 345 (2d Cir. 2006). As further evidence of its particular concern with crack cocaine, Congress subsequently enacted a provision imposing a minimum penalty (of five years of imprisonment) for simple possession of crack, even for first-time offenders—the only provision of its kind. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (21 U.S.C. 844(a)); 2002 Report 11; 1995 Report 123-125.

In 1987, the Sentencing Commission issued the initial version of the Sentencing Guidelines. See 52 Fed. Reg. 18,046. For drug-trafficking offenses, the Commission adopted sentencing ranges that would be consistent with the statutory minimum sentences mandated by Congress. See Guidelines § 2D1.1. Specifically, the Commission used the quantities of crack cocaine (and other specified drugs) that triggered the five- and ten-year minimum sentences as "reference points," and established offense levels for those quantities that (absent adjustments or a criminal history) would lead to sentences at or just above the statutory minimums. 1995 Report 126. Finding that "further refinement of drug amounts [was] essential to provide a logical sentencing structure for drug offenses," however, the Commission established graduated offense levels, whereby the offense level would increase (or decrease) in two-level increments as the amount of each drug increased (or decreased) from the threshold amounts. Guidelines § 2D1.1, comment. (backg'd). These additional base offense levels were "proportional to the levels established

by statute." *Ibid.*; see *id.* at comment. (n.10) ("The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences."). With specific regard to crack cocaine, the consequence of this approach was to incorporate into the Guidelines the 100:1 powder-to-crack ratio that Congress used in adopting the statutory sentencing ranges. For example, while distribution of 5 grams of crack cocaine (or 500 grams of powder cocaine) would lead to a statutory minimum sentence of 60 months, and distribution of 50 grams of crack (or 5 kilograms of powder) would lead to a statutory minimum of 120 months, distribution of 20 grams of crack (or 2 kilograms of powder) would generate a base offense level of 28, which (absent adjustments or a criminal history) would lead to a Guidelines range of 78 to 97 months. See Guidelines § 2D1.1(c)(6); *id.* Ch. 5, Pt. A (sentencing table).

3. In 1995, the Sentencing Commission issued a report in which it concluded that "the 100-to-1 quantity ratio that presently drives sentencing policy for cocaine trafficking offenses should be re-examined and revised." 1995 Report 197. Shortly thereafter, the Commission, by a 4-3 vote, submitted a proposed amendment to the Guidelines that would have replaced the 100:1 ratio with a 1:1 ratio (and therefore imposed the same penalties on otherwise identical crimes involving crack and powder cocaine). See 60 Fed. Reg. 25,075-25,077 (1995); *Castillo*, 460 F.3d at 346-347.

For the first time in the history of the Guidelines, Congress exercised its authority to reject the proposed amendment. See Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334. Congress explained that "the sentence imposed for trafficking in a quantity of crack cocaine

should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." § 2(a)(1)(A), 109 Stat. 334. At the same time, however, Congress directed the Sentencing Commission to "submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for * * * trafficking of cocaine." § 2(a)(1), 109 Stat. 334. Congress specifically provided that the Commission "shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in [18 U.S.C. 3553(a)]." § 2(a)(2), 109 Stat. 335.

In the legislative history, Congress emphasized that the evidence continued to support the view that longer sentences were appropriate for crack-cocaine offenses. See, *e.g.*, H.R. Rep. No. 272, 104th Cong., 1st Sess. 3-4 (1995). Notably, Congress also expressed concern that the Sentencing Commission's proposed amendment would conflict with the sentencing structure it had imposed in the 1986 Act. Specifically, the House Report explained that, "if the Commission's guidelines amendments went into effect without Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities," because "[s]entences just below the statutory minimum would be drastically reduced, but mandatory minimums would remain much higher." *Id.* at 4. As a result, the proposed amendment would "establish penalties for crimes that stand in sharp contrast with [the] statutory mandatory minimum penalties." *Ibid.* The principal sponsors of the statute expressed the same concern, and also indicated that any significant change in sentencing for

crack-cocaine offenses would require legislative action. See, *e.g.*, 141 Cong. Rec. 25,324 (1995) (statement of Sen. Abraham) (noting that "[t]he Commission's proposed changes are incompatible with the statutory mandatory minimum sentences that Congress has established," and that, "[r]ather than adjusting its guidelines to conform with congressional directives, * * * the Commission has instead elected to change the guidelines and ask Congress that it adjust the laws to accommodate the Commission's views"); *id.* at 27,202-27,203 (statement of Sen. Abraham) (noting that the statute "does not request the Commission to send new Guidelines changes" but "[r]ather * * * requests the Commission's recommendations for how the laws and guidelines should be changed"); *id.* at 27,203 (statement of Sen. Abraham) (explaining that "major changes in this area have to come from Congress, and until such changes are made the guidelines should conform with existing law"); *id.* at 28,359 (statement of Rep. McCollum) (contending that "[t]he Commission is to follow Congress' lead as Congress—not the Sentencing Commission—sets sentencing policy").

4. Since 1995, Congress has taken no action to alter the 100:1 ratio it adopted in the 1986 Act. In 1997, the Sentencing Commission, responding to Congress's rejection of its proposed amendment to the Guidelines, recommended that Congress "revise the federal statutory penalty scheme for both crack and powder cocaine offenses" by adopting a 5:1 ratio (and decreasing the quantity of powder cocaine necessary to trigger the statutory minimums). See United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 9 (1997) (1997 Report) <www.ussc.gov/r_congress/newcrack.pdf>. The Com-

mission did not propose a conforming amendment to the Sentencing Guidelines. In 2002, the Commission recommended that Congress adopt no higher than a 20:1 ratio (this time maintaining the quantity of powder cocaine necessary to trigger the statutory minimums). See 2002 Report 92. The Commission also recommended "using specific sentencing enhancements to target the minority of offenders who engage in the most harmful conduct that concerned Congress in 1986." *Id.* at 91-92. The Commission again did not formally propose an amendment to the Guidelines, but did include model revised guidelines in its report (based on the assumption that Congress would adopt a 20:1 ratio for the triggering quantities). See *id.* at A-1 to A-10. Although a number of bills to lower the 100:1 ratio were introduced in the wake of the Commission's 1997 and 2002 reports, none of the bills was enacted. See *Castillo*, 460 F.3d at 348, 350 (summarizing bills).[2]

B. Facts and Proceedings Below

1. On the evening of May 24, 2004, two police officers in Norfolk, Virginia, observed petitioner in the driver's seat of a vehicle parked in a well-known drug-trafficking area. Another individual was sitting in the passenger's

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[2] Earlier this year, the Sentencing Commission again recommended that Congress alter the ratio used in establishing the statutory minimum sentences for crack-cocaine offenses, although the Commission made no specific recommendation. See 2007 Report 8. The Commission also proposed an amendment to the Guidelines that would lower the base offense levels for those crimes (and subsequently sought comment on whether the amendment should be applied retroactively). See 72 Fed. Reg. 28,571-28,573 (2007); *id.* at 41,794-41,795. That amendment will take effect on November 1, 2007, unless it is modified or disapproved by Congress. See 28 U.S.C. 994(p). The amendment is discussed in further detail at p. 38 n.12, *infra*.

seat, and a third individual was crouched beside the driver's door. When the officers approached, the third individual fled. Petitioner had $125 on his lap; after petitioner agreed to a search of the vehicle, the officers found a bag containing 62 grams of powder cocaine and an additional $5,000. Petitioner and the passenger then attempted to flee; the officers apprehended them and found $1,823 and a magazine of bullets on petitioner's person, along with a loaded firearm that the passenger had dropped. A further search of the vehicle revealed 56 grams of crack cocaine, more powder cocaine, and a large quantity of additional cash. J.A. 30-32, 107-108.

2. On September 13, 2004, a grand jury in the Eastern District of Virginia returned an indictment charging petitioner with conspiring to distribute cocaine (*i.e.*, powder cocaine) and 50 grams or more of cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(iii) and (b)(1)(C), and 846; possessing 50 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c). J.A. 8-14. The indictment specified that petitioner was responsible for approximately 56 grams of crack cocaine and 92.1 grams of powder cocaine. J.A. 10, 11. Petitioner pleaded guilty to all four counts without entering into a plea agreement. J.A. 15-38.

3. Petitioner was sentenced after this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). In *Booker*, the Court held that the Sixth Amendment applies to the federal Sentencing Guidelines, *id.* at 226-244, and that, as a remedial matter, two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*,

should be severed, which would render the Guidelines advisory rather than mandatory, 543 U.S. at 244-268. Petitioner was subject to a statutory sentencing range of ten years to life on the crack-cocaine counts, see 21 U.S.C. 841(b)(1)(A)(iii), and a mandatory consecutive sentence of five years on the firearm-possession count, see 18 U.S.C. 924(c). Based on petitioner's conceded responsibility for 56 grams of crack cocaine and 92.1 grams of powder (which in total, based on the Guidelines' drug equivalency table, was the equivalent of 56.921 grams of crack or 5692.1 grams of powder), see J.A. 36, the presentence report (PSR) determined that petitioner's base offense level under the Guidelines was 32—the same base offense level that petitioner would have received if he had trafficked only 50 grams of crack cocaine (the triggering quantity for the ten-year statutory minimum). J.A. 109; see Guidelines §§ 2D1.1(c)(4), 2D1.1 comment. (n.10). The PSR recommended a two-level upward adjustment for obstruction of justice based on petitioner's false testimony at his co-defendant's trial. J.A. 110. Based on a total offense level of 34 and a criminal history category of II, petitioner's Guidelines sentencing range on the crack-cocaine counts was 168 to 210 months of imprisonment. Guidelines Ch. 5, Pt. A (sentencing table).

In his brief at sentencing, petitioner contended that, in the wake of *Booker*, the district court had the authority to address "the impact of the powder-crack cocaine disparity," J.A. 50, and that "the crack cocaine sentencing scheme with its 100-to-1 ratio generates unjustifiable disparities in sentencing." J.A. 51. Arguing that the district court "need no longer blindly adhere" to the 100:1 ratio, J.A. 52 (citation omitted), petitioner asked the district court to sentence him to the statutory mini-

mum of ten years (or 120 months) on the crack-cocaine counts (for a total sentence, including the mandatory consecutive sentence on the firearm count, of 180 months). J.A. 53. At the sentencing hearing, petitioner additionally argued that the court should vary downward from the Guidelines range because his prior convictions were for misdemeanor offenses and because he had a work history that was without incident. J.A. 70-71.

The district court agreed with the PSR that petitioner's Guidelines sentencing range on the drug counts was 168 to 210 months of imprisonment, but nevertheless sentenced petitioner to the statutory minimum of 120 months on the crack-cocaine counts. J.A. 67-68, 72-76. The court stated that "[i]t is the Court's humble view that to impose a [total] sentence of 19 to 22 years in this case is ridiculous." J.A. 72. Such a sentence, the court reasoned, would "impose[] more punishment, given the record here, than is necessary to accomplish what needs to be done." *Ibid.* The court asserted that, "[w]hile the Congress, the Sentencing Commission recognizes that crack cocaine has not caused the damage that the Justice Department alleges it has, the Justice Department has yet to recognize the disproportionate and unjust effect that crack cocaine guidelines have in sentencing." *Ibid.* "This case," according to the court, "is another example of how the crack cocaine guidelines are driving the offense level to a point higher than is necessary to do justice." *Ibid.* The court added that "[i]t's amazing that when the Court goes back and calculates the offense in this case using powder cocaine, because we are dealing with cocaine at the end of the day in this case, the level, the guidelines range comes down so significantly that it's unbelievable." J.A. 74. The

court reasoned that a lower sentence was necessary in order to "avoid imposing an unwarranted disproportionate sentence." *Ibid.*

Although the district court primarily relied, in imposing sentence, on its disagreement with the disparity in sentences for crimes involving crack and powder cocaine, the court also cited petitioner's limited criminal history, his work history, and his prior military service. J.A. 73, 74. The court expressed the view that the resulting sentence was still "too long," but acknowledged that it was bound by the statutory minimum on the crack-cocaine counts. J.A. 75. When the government sought to preserve its objection to the sentence, the court stated that it "f[ou]nd it absolutely ridiculous [that] the Department of Justice demands the heart and lungs, feet, and everything else in a case on these facts." J.A. 77.

4. In an unpublished per curiam opinion, the court of appeals vacated the sentence and remanded for resentencing. J.A. 96-98. Citing its then-recent decision in *United States* v. *Eura*, 440 F.3d 625 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006), in which it had held that "a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses," the court of appeals reasoned that the district court erred by "conclud[ing] that the crack to powder cocaine disparity warranted a sentence below the applicable sentencing guideline range." J.A. 98.

In *Eura*, the district court had calculated the defendant's sentence for a crime involving crack cocaine as if "the Commission's 2002 recommendation [of a 20:1 ratio] [had] been adopted by Congress." 440 F.3d at 631 n.6.

The court of appeals concluded that the sentence was unreasonable. *Id.* at 632. The court of appeals explained that "giving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity between similarly situated defendants." *Id.* at 633. Such disparities, the court of appeals reasoned, "tell us that sentencing courts should not be in the business of making legislative judgments concerning crack cocaine and powder cocaine." *Ibid.*

The court of appeals then observed that "Congress has made a decision to treat crack cocaine dealers more severely than powder cocaine dealers" and "has also decided to instruct sentencing courts to avoid disparate sentences for crack cocaine dealers." *Eura*, 440 F.3d at 633. Based on those observations, the court concluded that "it simply would go against two explicit Congressional directives to allow sentencing courts to treat crack cocaine dealers on the same, or some different judicially-imposed, plane as powder cocaine dealers." *Ibid.* The court added that "allowing sentencing courts to subvert Congress' clearly expressed will certainly does not promote respect for the law, provide just punishment for the offense of conviction, or result in a sentence reflective of the offense's seriousness as deemed by Congress." *Ibid.* The court noted that "it does not follow that *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range," but that, in imposing a below-Guidelines sentence, "a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the [statutory sentencing] factors." *Id.* at 634.

Judge Michael concurred in part and concurred in the judgment in *Eura*, reasoning that a court could not *solely* rely on its disagreement with the disparity in sentences for trafficking crack and powder cocaine in imposing a below-Guidelines sentence. 440 F.3d at 634-639.

SUMMARY OF ARGUMENT

A. Congress has the power to prescribe the appropriate level of punishment for criminal offenses. It may not only set minimum and maximum penalties for an offense, but also restrict the courts' exercise of discretion within the statutory sentencing range. Where Congress imposes such restrictions, and where those restrictions do not violate the Constitution, courts are bound to abide by them. That is true even though courts otherwise have broad discretion in imposing sentence under the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, as modified by this Court in *United States* v. *Booker*, 543 U.S. 220 (2005). The Sentencing Guidelines are now advisory, and courts may vary based solely on policy considerations, including disagreements with the Guidelines. But where Congress has made a specific policy determination concerning a particular offense (or offense or offender characteristic) that legally binds sentencing courts, and the Commission (as it must) incorporates that policy judgment into the Guidelines in order to maintain a rational and logical sentencing structure, that specific determination restricts the general freedom that sentencing courts have to apply the factors set forth in 18 U.S.C. 3553(a). Congress did not intend for the general standards in Section 3553(a) to trump specific policy determinations that Congress itself directs to sentencing courts. *Booker* provides for

review of sentences for "reasonableness," and a sentencing court does not act reasonably when it rejects a specific congressional mandate.

B. As almost all of the courts of appeals that have addressed the issue have held, Congress has made a binding policy determination with regard to the relative severity of trafficking crimes involving crack and powder cocaine. Congress has determined, first, that, in sentencing a defendant for a crack-cocaine offense, a court should take into account the quantity of crack involved, and second, that a court should do so in a manner that respects the 100:1 ratio of powder to crack used by Congress in establishing the sentencing ranges for offenses involving those two substances. Congress's policy determination is embodied in the structure of the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, which establishes that, in sentencing defendants who distribute quantities of crack cocaine (or other regulated drugs), courts should take the quantities into account and sentence defendants accordingly. That determination is not limited solely to the specific mandatory minimum sentences that Congress linked to the 100:1 ratio. Rather, the Commission incorporated that determination into the relevant provisions of the Sentencing Guidelines, which establish different sentencing ranges based on differing quantities in order to provide a logical and coherent sentencing structure. The 100:1 ratio in the Guidelines is thus a direct and necessary consequence of the directions Congress gave to sentencing courts in the 1986 Act.

To the extent there was any doubt, however, Congress subsequently made clear, in rejecting the Sentencing Commission's proposed amendment that would have replaced the 100:1 ratio with a 1:1 ratio, that any change

in the ratio must come from Congress, not the Commission. Because Congress has left the 100:1 ratio in place—even in the face of sustained criticism of that ratio from the Commission and repeated legislative proposals to amend it—courts must impose sentence in a manner that respects the ratio. Under petitioner's contrary understanding of the relevant congressional policy, courts would be free to form whatever judgments they like about the comparative severity of crack-cocaine and other drug offenses, seemingly including use of 5:1, 20:1, or other judge-specific ratios, subject only to the applicable statutory minimum and maximum sentences and reasonableness review. That approach is a recipe for widespread disparity, and the Court should reject it as inconsistent with congressional intent.

C. Because *Congress* has made a binding policy determination concerning sentencing for crack-cocaine offenses that applies to both sentencing courts and the Commission, this case does not present the issue whether district courts may vary from the *Sentencing Guidelines* standing alone based on a reasoned disagreement with Commission policy. This case involves a sentencing structure created by Congress directly, not solely through the medium of the Commission's now-advisory work. Courts therefore may not second-guess the 100:1 ratio as a policy matter. But Congress's policy determination about the relative severity of crack and powder offenses does not effectively render the Guidelines mandatory for crack-cocaine offenses; courts remain free to vary from the Guidelines sentencing range in crack-cocaine cases based on *other* policy considerations (or on relevant facts), subject to subsequent reasonableness review. For largely the same reasons, Con-

gress's establishment of a policy on this one issue does not raise Sixth Amendment difficulties.

D. Because the district court in this case relied on an impermissible factor in sentencing petitioner, *i.e.*, its disagreement with and rejection of the 100:1 ratio adopted by Congress, the court of appeals correctly held that the district court committed error. On remand, the district court should be required to resentence petitioner without reliance on that invalid consideration.

ARGUMENT

A DISTRICT COURT MAY NOT REDUCE A DEFENDANT'S SENTENCE BASED ON ITS DISAGREEMENT WITH THE 100:1 RATIO ADOPTED BY CONGRESS FOR CALCULATING SENTENCES FOR CRIMES INVOLVING CRACK AND POWDER COCAINE

Under the Constitution, Congress has the power to set sentencing policy. With regard to crack-cocaine and powder-cocaine offenses, Congress has determined that crack offenders should receive significantly greater penalties than powder offenders, and it has directed courts to apply a 100:1 ratio used in setting the statutory sentencing ranges. The same ratio is incorporated in the Sentencing Guidelines in order to establish a proportional and consistent sentencing structure. As the overwhelming majority of courts of appeals to have addressed the issue have held,[3] when a sentencing court

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[3] See *United States* v. *Ricks*, No. 05-4832, 2007 WL 2068098, at *5 (3d Cir. July 20, 2007); *United States* v. *Leatch*, 482 F.3d 790, 791-792 (5th Cir. 2007) (per curiam), petition for cert. pending, No. 06-12046 (filed June 21, 2007); *United States* v. *Spears*, 469 F.3d 1166, 1176-1178 (8th Cir. 2006) (en banc), petition for cert. pending, No. 06-9864 (filed Mar. 2, 2007); *United States* v. *Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 687 (7th Cir. 2006), petition for

bases its sentence in whole or in part on its categorical disagreement with Congress's policy determination, the resulting sentence is necessarily unreasonable. The district court did precisely that in this case, and the court of appeals therefore correctly vacated the sentence.

A. Congress's Policy Determinations Concerning The Appropriate Level Of Punishment For Criminal Offenses Are Binding On Sentencing Courts

1. This Court has long recognized that the Constitution assigns to Congress the power to define criminal offenses and to prescribe the appropriate level of punishment for those offenses. As Chief Justice Marshall explained, "the power of punishment is vested in the legislative, not in the judicial department," and "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); accord *Whalen* v. *United States*, 445 U.S. 684, 689 (1980); *Gore* v. *United*

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cert. pending, No. 06-7600 (filed Oct. 27, 2006); *United States* v. *Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006), cert. dismissed, 127 S. Ct. 3040 (2007); *United States* v. *Eura*, 440 F.3d 625, 633-634 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006); *United States* v. *Pho*, 433 F.3d 53, 64 (1st Cir. 2006); see also *United States* v. *McCullough*, 457 F.3d 1150, 1172 (10th Cir. 2006) (dictum), cert. denied, 127 S.Ct. 988 (2007). By contrast, the District of Columbia Circuit has held that a district court errs when it concludes that it lacks discretion to *consider* the 100:1 ratio in imposing sentence. See *United States* v. *Pickett*, 475 F.3d 1347, 1351-1356 (2007), petition for cert. pending, No. 07-218 (filed Aug. 20, 2007). The Third Circuit had similarly held in *United States* v. *Gunter*, 462 F.3d 237 (2006), but it qualified that holding in *United States* v. *Ricks*, *supra*, by making clear that a sentencing court cannot categorically replace the 100:1 ratio with one of its own.

States, 357 U.S. 386, 393 (1958); *United States* v. *Evans*, 333 U.S. 483, 486 (1948).

Congress may exercise its power to prescribe the appropriate level of punishment either by specifying the penalty for an offense or by setting minimum and maximum penalties for the offense (and leaving it to judicial discretion to choose a sentence within the statutory sentencing range). See, *e.g.*, *Chapman* v. *United States*, 500 U.S. 453, 467 (1991). Should Congress provide a statutory sentencing range, it may impose restrictions on the manner in which courts exercise their discretion within the range. Typically, Congress has "delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within [a] * * * wide [statutory] range." *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). But this Court has emphasized that "the scope of judicial discretion with respect to a sentence is subject to congressional control." *Ibid.*; cf. *Harris* v. *United States*, 536 U.S. 545, 567 (2002) (plurality opinion) (explaining that, "[w]ithin the range authorized by the jury's verdict, * * * the political system may channel judicial discretion").[4]

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[4] Occasionally, Congress has provided explicit guidance about the exercise of judicial discretion in sentencing within a range. For example, in 27 U.S.C. 91 (1934), Congress provided that, in sentencing within the five-year maximum for certain violations of the Prohibition laws, "it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law." Guidance of that type reflects only what it is implicit in Congress's provision of a sentencing range, *i.e.*, that courts should graduate sentences within the range according to the degree of the defendant's culpability. Indeed, "the only rational purpose in prescribing maximum and minimum penalties is to enable just such discrimination, and, so far as human judgment can effect it, to fit the punishment

When Congress makes policy determinations concerning the appropriate level of punishment for criminal offenses—whether it does so by specifying the penalty for the offense, setting minimum and maximum penalties, or by limiting the exercise of judicial discretion within the statutory sentencing range—courts are bound to adhere to those determinations. That principle is rooted in the separation of powers, because determinations concerning the appropriate level of punishment are no different from other legislative determinations that courts are obliged to respect. See, *e.g.*, *Ewing* v. *California*, 538 U.S. 11, 29 (2003) (plurality opinion) (noting that courts must "accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions"); *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541 (1989) (concluding that "[t]he judiciary should not substitute its judgment as to seriousness [of an offense] for that of a legislature, which is far better equipped to perform the task") (internal quotation marks and citation omitted); *Harmelin* v. *Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (observing that "[d]eterminations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions" and that "the responsibility for making these fundamental choices and implementing them lies with

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to the particular offense." *Foster* v. *United States*, 47 F.2d 892, 892-893 (7th Cir. 1931). Accordingly, *Foster* rejected a claim that Congress's direction to the sentencing court in former Section 91 infringed the right to jury trial, explaining that "[t]he judge who, having power and discretion to fix the penalty within the prescribed statutory limits, would not in all circumstances discriminate between casual or slight violations and those which are more serious, would be unworthy of his high office." *Id.* at 892.

the legislature"). Courts may refuse to follow congressional policy determinations concerning sentencing only when those determinations violate the Constitution, *e.g.*, by imposing cruel and unusual punishment or a constitutionally excessive fine. See *United States* v. *Bajakajian*, 524 U.S. 321 (1988).

2. In the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.*, Congress established general considerations that courts must take into account in exercising their sentencing discretion. Specifically, Congress directed courts, "in determining the particular sentence to be imposed," to consider seven factors:

(1) "the nature and circumstances of the offense and the history and characteristics of the defendant";

(2) "the need for the sentence imposed" (A) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (B) "to afford adequate deterrence to criminal conduct"; (C) "to protect the public from further crimes of the defendant"; and (D) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner";

(3) "the kinds of sentences available";

(4) "the kinds of sentence and the sentencing range established for * * * the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines * * * issued by the Sentencing Commission";

(5) "any pertinent policy statement * * * issued by the Sentencing Commission";

(6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and

(7) "the need to provide restitution to any victims of the offense."

18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Congress further required courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in paragraph (2). *Ibid.*

While Congress in the SRA directed courts to consider the enumerated factors in exercising their sentencing discretion, Congress also *required* courts to impose the sentence set forth in the Sentencing Guidelines (unless there was a basis for departing from the Guidelines range). 18 U.S.C. 3553(b)(1) (Supp. IV 2004). In *United States* v. *Booker*, 543 U.S. 220 (2005), the Court held that the Sixth Amendment applies to the federal Sentencing Guidelines, *id.* at 226-244, and that, as a remedial matter, Section 3553(b)(1), which had made the Guidelines mandatory, should be severed, *id.* at 244-268. As modified by *Booker*, "[the SRA] makes the Guidelines effectively advisory"; "[i]t requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id.* at 245-246 (citations omitted). The Court also severed an appellate-review provision, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which required de novo review of decisions to depart from the Guidelines, and required instead that courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C. § 3553(a)]." 543 U.S. at 261.

In the wake of *Booker*, district courts must consider the broad factors enumerated in Section 3553(a) in imposing sentence. In considering those factors, however, district courts do not have limitless discretion, but are bound by any specific policy determinations that Congress has directed sentencing courts to observe concerning particular offenses (or offense or offender characteristics). Where Congress has made such specific policy determinations, they will not ordinarily conflict with the generally applicable sentencing factors in Section 3553(a); instead, Congress's determinations will simply give content to, and inform the application of, those factors. See, *e.g.*, *United States* v. *Castillo*, 460 F.3d 337, 357 (2d Cir. 2006) (noting that "courts do not operate in a vacuum" in applying the Section 3553(a) factors). But if a specific mandatory policy that Congress directs to sentencing courts does create a conflict with what a district court believes to be the general charge of Section 3553(a), the specific expressions of Congress's will must control, under the familiar canon of construction that the specific governs the general. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2348 (2007); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Guidry* v. *Sheet Metal Workers Pension Fund*, 493 U.S. 365, 375 (1990); *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).[5] Congress cannot be thought to have licensed courts under the general guise of Section 3553(a) to disagree with, and thus nullify, specific policy directions that Congress itself has also given to sentencing courts. Thus, when a court disagrees with specific

[5] That is not to say that there will always be a conflict between specific and general statutes, because the Section 3553(a) factors themselves accommodate the specific judgments of Congress concerning, *inter alia*, "the seriousness of the offense." 18 U.S.C. 3553(a)(2)(A).

statutory policies embodied in directions to the sentencing court (and the court relies on that disagreement in imposing sentence), the resulting sentence will necessarily be unreasonable.[6]

For example, in considering the directive in Section 3553(a)(2)(A) to take into account "the need for the sentence imposed * * * to reflect the seriousness of the offense" (or the directive in Section 3553(a)(1) to take into account "the nature and circumstances of the offense"), a sentencing court is bound by any congressional policy determination directed to the sentencing court concerning the seriousness of a particular offense or offense characteristics—just as a sentencing court would be bound by a statute specifying the penalty for that offense. If Congress were to provide that a court should ordinarily sentence a defendant convicted of armed bank robbery toward the top of the statutory sentencing range where the defendant was found to have committed the robbery with an automatic rifle, a district court could not sentence the defendant at the bottom of the range based on its own view that bank robberies committed with automatic rifles are categorically no more "serious" than other armed bank robberies. So too the courts are bound by Congress's judgment that

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[6] As this Court recently explained in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), "appellate 'reasonableness' review merely asks whether the trial court abused its discretion." *Id.* at 2465. A disagreement with a congressional policy determination constitutes a legal error giving rise to an abuse of discretion. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996) (noting that "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions"); *Rita*, 127 S. Ct. at 2483 n.6 (Scalia, J., concurring) (explaining that reasonableness review "includes the limiting of sentencing factors to permissible ones").

crack-cocaine offenses are much more serious than offenses involving comparable amounts of powder cocaine.

Similarly, in considering the directive in Section 3553(a)(6) to take into account "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," a sentencing court is bound by any congressional policy determination concerning the similarity of certain conduct to other conduct (and the appropriateness of a sentencing disparity)—just as a sentencing court would be bound by statutes specifying different penalties for each type of conduct. See, *e.g.*, *United States* v. *Sebastian*, 436 F.3d 913, 916 (8th Cir. 2006) (concluding that "[t]he command that courts should consider the need to avoid 'unwarranted sentence disparities' * * * emanates from a statute, and it is thus within the province of the policymaking branches of government to determine that certain disparities are warranted, and thus need not be avoided"). If Congress were to provide that, for sentencing purposes, a court should treat an armed robbery committed with an automatic rifle the same as an armed robbery committed with a silenced pistol, a district court could not sentence a defendant who used an automatic rifle more harshly based on its own view that such an armed robbery is not "similar" to an armed robbery with a silenced pistol, or that a disparity in sentencing between the two types of armed robbery is "warranted." Moreover, freedom to disregard such congressional judgments and allow each judge to assess the relative severity of certain conduct is an invitation to disparity that Section 3553(a)(6) charges courts to avoid.

Nothing in this Court's decision in *Booker* altered a sentencing court's obligation to adhere to specific congressional policy determinations in sentencing. See,

e.g., *United States* v. *Cannon*, 429 F.3d 1158, 1161 (7th Cir. 2005) (concluding that "*Booker* does not permit courts to make independent decisions about the wisdom of legislation"). While sentencing courts are to treat the Guidelines as advisory and to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in Section 3553(a)(2), that general responsibility does not authorize a sentencing court to contravene a congressional policy determination.

3. Like sentencing courts, the Sentencing Commission itself is bound by specific congressional policy determinations. For the most part, Congress delegated discretionary authority to the Sentencing Commission to formulate Guidelines for classes of offenses and offenders in order to effectuate the goals of sentencing set out in the SRA. See *Rita* v. *United States*, 127 S. Ct. 2456, 2463 (2007); *Mistretta*, 488 U.S. at 374. That discretion is not unlimited, however, because Congress provided substantial guidance to the Commission about the general principles to incorporate into the Guidelines. For example, Congress required the Commission to provide sentences at or near the statutory maximum for certain career offenders, 28 U.S.C. 994(h); to require substantial terms of imprisonment for certain drug offenders, 28 U.S.C. 994(i)(5); and to reflect the fact that many pre-SRA sentences had not accurately captured the seriousness of the offense, 28 U.S.C. 994(m). See *Mistretta*, 484 U.S. at 377 (noting that, "although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and

offender characteristics to place defendants within these categories").

When the Commission acts under such congressional guidance, the guidelines it produces are, under *Booker*, best understood as advisory. A district court may therefore sentence based on policy considerations that differ from those reflected in the Guidelines (subject to reasonableness review on appeal). See U.S. Br. at 35-37, *Gall* v. *United States*, No. 06-7949. The same appears to be true even if Congress imposes a specific mandate on the Commission to write a particular guideline or if Congress writes language in the Guidelines manual itself. As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will be best understood as advisory under *Booker* and subject to the general principles of sentencing in Section 3553(a).[7]

Matters are different when Congress expresses its policy not wholly through the Guidelines, but through *direct* sentencing requirements imposed on courts. In that situation, the Guidelines *must* reflect and incorporate Congress's policy judgments because of the necessity of coordinating the Guidelines with sentencing statutes. The resulting "guideline" is essentially just a reflection of the direct congressional policy mandate to sentencing courts. Only by incorporating the direct congressional sentencing mandate to the district courts into such a guideline can the Commission both conform to Congress's will and provide a coherent sentencing

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[7] Of course, as the United States noted in its brief in *Gall* (at 37 n.11), the nature and specificity of policy judgments in the Guidelines can also inform the substantive reasonableness review envisioned by *Booker* and *Rita*. A policy-based variance from the Guidelines is not entitled to as much deference on reasonableness review as a fact-based variance.

scheme that avoids unwarranted disparities. But the resulting guideline differs from ordinary guidelines. A sentencing court that purports to reject such a guideline for policy reasons would be disagreeing not just with the action of the Commission, but with a direct mandate of Congress.

Two critical features combine to distinguish guidelines that simply implement the SRA from guidelines that incorporate congressional policy in a manner that binds district courts even after *Booker*. First, Congress has directed the Commission to promulgate guidelines that are "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. 994(a). When those provisions contain sentencing directives that bind district courts, the Commission cannot override or ignore them. Cf. *United States* v. *LaBonte*, 520 U.S. 751, 757 (1997) (invalidating amendment to the career offender guideline, Guidelines § 4B1.1, that violated 28 U.S.C. 994(h)'s provision that the Commission must "assure" that a career offender receive a sentence "at or near the maximum term authorized," and explaining that the Commission's discretion "must bow to the specific directives of Congress"). Second, the Commission, like Congress, has an obligation to provide a "rational sentencing scheme." *Chapman* v. *United States*, 500 U.S. 453, 465 (1991) (upholding the rationality of 21 U.S.C. 841(b), which "assigns more severe penalties to the distribution of larger quantities of drugs"). The Commission cannot formulate a rational guidelines scheme without logically linking its penalties to the sentencing directions that Congress has given directly to the courts. An irrational disconnect between the guidelines and Congress's directions to sentencing courts would undermine the sentencing statutes and create an unworkable and incoherent system. Accordingly, when Congress establishes a sentencing pol-

icy that binds both the Commission and the courts, individual judges cannot lawfully impose sentences based on disagreements with that policy.

B. Congress Has Determined That, In Sentencing A Defendant For A Crack-Cocaine Offense, A Court Should Take Into Account The Quantity Of Crack Involved And Sentence The Defendant In A Manner That Respects The 100:1 Ratio

Congress has established precisely such a binding sentencing policy with regard to the relative severity of trafficking crimes involving crack and powder cocaine. Specifically, Congress has made clear, first, that, in sentencing a defendant for a crack-cocaine offense, a court should take into account the quantity of crack involved, and second, that, a court should do so in a manner that respects the 100:1 ratio of powder to crack used by Congress in establishing the sentencing ranges for offenses involving those two substances. Petitioner's attempt to limit Congress's policy merely to statutory minimum terms is unsustainable.

1. In the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, Congress established a three-tier penalty system for certain drugs, based on the quantity of the distributed substance. In setting the threshold quantities required to trigger the top two tiers of sentencing ranges, the 1986 Act first adopted the 100:1 ratio of powder to crack cocaine, such that each threshold for powder was set at 100 times the corresponding threshold for crack. See 21 U.S.C. 841(b)(1)(A)(ii)-(iii) and (b)(1)(B)(ii)-(iii).[8] In doing so, Congress

[8] The 100:1 ratio refers only to the relative *quantities* necessary to trigger the same *sentences* for trafficking crimes involving crack and powder cocaine, not to the relative *sentences* imposed for crimes involving the same *quantity*. See *Pho*, 433 F.3d at 55 n.2. Although the

clearly intended to impose significantly greater penalties on distributors of crack cocaine than similarly situated distributors of powder cocaine. See *United States* v. *Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006) (noting that "Congress's decision to punish crack cocaine offenders more severely than powder cocaine offenders is plainly a policy decision" and "reflects Congress's judgment that crack cocaine poses a greater harm to society than powder cocaine"), cert. dismissed, 127 S. Ct. 3040 (2007); see generally *Frank* v. *United States*, 395 U.S. 147, 148 (1969) (explaining that "[t]he most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission"). Accordingly, any sentence that purports to equate the severity of an offense involving crack cocaine to that of an offense involving a similar amount of powder cocaine cannot be squared with Congress's policy mandate.

Nor does the scheme leave any doubt as to how much more severely offenses involving crack are to be treated. Congress chose a 100:1 ratio. Contrary to petitioner's contention (Br. 24), in enacting the 1986 Act, Congress did not simply establish *minimum* sentences for crack-cocaine offenses. Implicit in the 1986 Act was a structural determination for courts and the Commission, as they dealt with defendants who distributed quantities of crack cocaine that were below, between, or above the two specified "reference points." Specifically, the Act

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sentence for a crime involving a given quantity of crack cocaine is typically substantially longer than the sentence for a crime involving the same quantity of powder cocaine, that disparity is invariably much smaller than 100:1. See *ibid.* (citing United States Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (2002) <www.usdoj.gov/olp/pdf/crack_powder2002.pdf>); United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 12-14 (2007) (2007 Report).

contemplates graduated sentencing that would maintain a proportional, quantity-based progression around the minimum sentences specified for the threshold amounts of crack. Such sentences would necessarily respect the 100:1 ratio of powder to crack, because, as one court has explained, "it would be illogical to set the maximum and minimum sentences on one construct and then to use some other, essentially antithetic construct as the basis for fashioning sentences within the range." *United States* v. *Pho*, 433 F.3d 53, 63 (1st Cir. 2006); cf. *United States* v. *Pickett*, 475 F.3d 1347, 1355 (D.C. Cir. 2007) (acknowledging that "[i]t may be logical to suppose that, given the structure of § 841, the greater the weight of the mixture containing the drug, the greater the sentence should be"), petition for cert. pending, No. 07-218 (filed Aug. 20, 2007).

Perhaps most significantly, a sentencing method that either did not take into account the quantity of crack involved or did so in a manner inconsistent with the 100:1 ratio would lead to drastic and obviously unwarranted sentencing disparities, or "cliffs," based on insignificant differences in drug quantities. Under such a method, a defendant who was responsible for a quantity of crack cocaine that was just below the triggering quantity for a statutory minimum sentence—*e.g.*, 49 grams—could receive a considerably lower sentence than an otherwise identically situated defendant who was responsible for the triggering quantity (and thus subject to the statutory minimum). While Congress did not *expressly* "direct[] the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines" (Pet. Br. 15), it would be logically incoherent to read the 1986 Act not to require the Commission and sentencing courts to apply a graduated penalty structure that takes drug quantity into ac-

count (and does so in a manner that respects the 100:1 ratio).

Notably, when the Sentencing Commission established the relevant Sentencing Guidelines for drug-trafficking offenses in 1987, it read the 1986 Act the same way. The Commission adopted sentencing ranges that used the triggering quantities of crack cocaine (and other drugs subject to the three-tier system) as "reference points"; set offense levels for those quantities that would presumptively lead to sentences at or just above the statutory minimums; and established graduated offense levels, whereby the offense level would increase (or decrease) in two-level increments as the amount of the drug increased (or decreased) from those quantities. See Guidelines § 2D1.1(c). The consequence of that approach was to carry forward the 100:1 powder-to-crack ratio that Congress used in the statutory sentencing ranges.[9] Critically, the Commission explained that the "further refinement of drug amounts" reflected in the Guidelines was "essential to provide a logical sentencing structure for drug offenses" in light of the statutory minimums adopted in the 1986 Act. Guidelines § 2D1.1, comment. (backg'd). The Commission thereby recognized that, in the wake of the 1986 Act (and its own obligation to "reduc[e] unwarranted sentence disparities," 28 U.S.C. 994(f)), it "was left no choice but to employ the same ratio in crafting the various Guidelines ranges within th[e] statutory ranges." *Williams*, 456 F.3d at 1368.

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[9] The Commission used the same ratios in devising the drug equivalency table, which is used where (as here) a defendant is responsible for quantities of multiple drugs. See Guidelines § 2D1.1 comment. (n.10).

2. In 1995, Congress rejected the Commission's proposal to amend the Guidelines and replace the 100:1 ratio with a 1:1 ratio (thus imposing the same penalties on otherwise identical offenses involving crack and powder cocaine). See Pub. L. No. 104-38, 109 Stat. 334.[10] Congress expressed the view that the 1:1 ratio proposed by the Commission was too low, emphasizing that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." § 2(a)(1)(A), 109 Stat. 334.

In rejecting the Commission's proposed amendment, however, Congress not only disapproved of the 1:1 ratio, but went further and made clear what was implicit in the structure of the 1986 Act: *i.e.*, that the 1986 Act required the Commission (and sentencing courts) to take drug quantities into account, and to do so in a manner that respects the 100:1 ratio. Specifically, while Congress "authorized consideration of alternative approaches" (Pet. Br. 26) by inviting the Commission to propose a more modest revision to the 100:1 ratio, Congress indicated that any such revision would require changes not only to the relevant guidelines, but also to the 1986 Act itself—thereby reflecting Congress's understanding that the 1986 Act mandated adherence to the 100:1 ratio in imposing sentence. See, *e.g.*, Pub. L. No. 104-38, § 2(a)(1), 109 Stat. 334 (directing the Commission to "submit to Congress recommendations (and

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[10] The Sentencing Commission had issued its proposed amendment in response to a congressional directive to provide a report that "address[es] the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 2097.

an explanation therefor), regarding changes to *the statutes and sentencing guidelines* governing sentences for * * * trafficking of cocaine") (emphasis added); § 2(a)(2), 109 Stat. 335 (providing that the Commission "shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under *the relevant statutes and guidelines* in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in [18 U.S.C. 3553(a)]") (emphasis added). Congress's rejection of the proposed amendment therefore constituted "a clear statement of Congressional belief that changing the Guidelines ratio without changing the mandatory minimums would result in an unwarranted disparity, while retaining the ratio at 100:1 would not." *Castillo*, 460 F.3d at 358.

The legislative history to the 1995 statute confirms that Congress understood that any proposed sentencing system that takes drug quantity into account in a manner inconsistent with the 100:1 ratio would conflict with the structure of the 1986 Act. The House Report expressed concern that the proposed amendment would give rise to sentencing "cliffs" near the triggering quantities—a concern that, as explained above, would exist whenever a sentencing system was based on a ratio other than 100:1 (but the statutory minimums based on the 100:1 ratio remained). See H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995) (noting that, if the "amendments went into effect without Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities" around the statutory minimum and thereby "establish penalties for crimes that stand in sharp contrast with statutory mandatory minimum penalties"). And the principal sponsors of the statute stated not only that the proposed amendment was inconsistent with the 1986 Act, but that any

significant change in sentencing for crack-cocaine offenses would require legislative action. See pp. 8-9, *supra* (quoting statements of Sen. Abraham and Rep. McCollum).[11]

In 1997 and 2002, the Sentencing Commission issued reports criticizing the 100:1 ratio. Notably, however, in both of those reports, the Commission, consistent with the view expressed by Congress in rejecting the Commission's proposed amendment in 1995, seemingly acknowledged that Congress would need to take action before the Commission could deviate from the 100:1 ratio, and duly recommended that Congress do so (on the understanding that the Commission would then make conforming changes to the relevant guidelines). See, *e.g.*, United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 9 (1997) (recommending that Congress "revise the federal statutory penalty scheme for both crack and powder cocaine offenses" by, *inter alia*, adopting a 5:1 ratio); United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 92 (2002) (recommending, *inter alia*, that Congress "decreas[e] the residual quantity-based penalties that apply to all crack cocaine offenders" by adopting no higher than a 20:1 ratio); but cf. *id.* at 90 (stating that "the legislative history is ambiguous as to whether Congress intended the penalty structure for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traf-

[11] Cf. H.R. Rep. No. 460, 103d Cong., 2d Sess. 5 (1994) (noting that, under "safety valve" provision, the least culpable offenders would receive two-year sentences, and "[the] Guideline ranges for other offenders would be expected to increase progressively, in proportion to indicia of culpability or seriousness, from the floor of the two year guideline range").

fickers created by the 1986 Act"). Those reports confirm the Commission's understanding, dating from the initial Guidelines on drug quantity in 1987, that the Commission, like courts, is required to take drug quantities into account in setting sentences for crack-cocaine offenses, and that it is required to do so in a manner that respects the 100:1 ratio. *A fortiori*, by the Commission's own reasoning, the Commission's criticism of the 100:1 ratio in its reports cannot defeat Congress's *adoption* of the 100:1 ratio in the 1986 Act.[12]

3. Since 1995, Congress has taken no action to alter the 100:1 ratio, despite the Sentencing Commission's reports criticizing that ratio. Although a number of bills

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[12] Earlier this year, the Sentencing Commission again recommended that Congress alter the ratio used in establishing the statutory minimum sentences for crack-cocaine offenses, although the Commission made no specific recommendation. See 2007 Report 8. In doing so, the Commission reiterated that "establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress's prerogative." *Id.* at 9. The Commission simultaneously proposed an amendment to the Guidelines that would lower base offense levels for crack-cocaine offenses by two levels (and make conforming changes to the drug equivalency table)—with the result that, at quantities that trigger a statutory minimum sentence, the statutory minimum sentence would fall near the top, rather than at the bottom, of the resulting Guidelines sentencing range. See 72 Fed. Reg. 28,571-28,573 (2007). Although the Commission makes no reference in its accompanying report to the effect of the proposed amendment on the ratio, the amendment implements a ratio of powder to crack cocaine that varies (at different offense levels) from 25:1 to 80:1. That amendment will take effect on November 1, 2007, unless it is modified or disapproved by Congress. See 28 U.S.C. 994(p). Should Congress allow the amendment to take effect, it could apply in this case only if it were made retroactive, see 18 U.S.C. 3582(c)(2); 18 U.S.C. 3742(g)(1) (Supp. IV 2004); 72 Fed. Reg. 41,794-41,795 (2007) (requesting comment on proposal to make amendment retroactive), and if it were held to be valid, see *LaBonte*, 520 U.S. at 757.

to lower the 100:1 ratio have been introduced, none of those bills has been enacted. See *Castillo*, 460 F.3d at 348, 350 (summarizing bills). While members of Congress have "acknowledged that the [100:1] ratio is problematic" (Pet. Br. 15)—and, indeed, Congress has invited the Commission to propose revisions to that ratio—it is well established that "[c]ongressional inaction cannot amend a duly enacted statute." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

4. Petitioner's contrary understanding of congressional policy—under which Congress has done nothing more than establish statutory minimums for certain drug offenses, see Pet. Br. 24—would leave courts free not only to impose *lower* sentences for crimes involving crack cocaine (on the basis that the 100:1 ratio embodied in the Guidelines is not congressionally mandated and is excessive), but also to impose *higher* sentences for crimes involving *powder* cocaine (on the same basis). See *id.* at 29 (contending that "a district court not only may, but should, conduct its own evaluation of the 100:1 ratio"). Indeed, it would leave courts free to adopt whatever views they wished about the comparative severity of drugs (subject only to the statutory sentencing ranges and reasonableness review) in cases involving *any* of the drugs subject to Congress's three-tier quantity-based system. Courts thus could register their disagreement with Congress's relative treatment of any combination of those drugs (as reflected in the triggering quantities in the 1986 Act). That is because, as petitioner acknowledges, it necessarily follows from petitioner's understanding of congressional policy that a court could conclude that trafficking in any of those drugs constitutes "similar conduct" for purposes of Section 3553(a)(6) (and impose sentence accordingly), subject only to whatever limits are imposed by appellate reasonableness review.

See *id.* at 30 (contending that "[t]he term 'similar conduct' is broad enough to include all drug offenses"); cf. FPCD Br. 19 (contending that "a sentencing court might appropriately identify *all* cocaine defendants distributing comparable quantities" as having engaged in "similar conduct"). As a result, "the entire drug quantity table could be effectively discarded as courts express differing opinions as to the relative harmfulness of different drugs." *Castillo*, 460 F.3d at 359.

The end result of giving courts the discretion to modify or disregard the 100:1 ratio would be considerable disparities in sentencing for drug offenses. If each sentencing judge is permitted to adopt whatever policy he deems appropriate with regard to individual drugs (subject only to the statutory sentencing ranges), defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing. And each judge could formulate his own ratio—with the result that one judge might use 5:1, another 20:1, and yet a third 100:1.[13] Insofar as a judge adopts ratios of his own or even concludes that trafficking in different quantities of the same drug (within the same statutory range) constitutes "similar conduct" warranting similar sentences, the same judge could end up imposing wildly different sentences based on insignificant variations in drug quantity around the statutory triggers, resulting in sentenc-

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[13] While petitioner shrinks from that suggestion, see Br. 32 & n.9, one of his amici embraces it. See ACLU Br. 24 ("If, for example, the sentencing court believes that the 100:1 ratio does not * * * 'reflect the seriousness of the offense,' 18 U.S.C. § 3553(a)(2), but does believe that a 20:1 ratio would carry out this purpose of sentencing, then the court should be able to follow this Congressional directive and impose a sentence that takes that alternative ratio as a starting point for considering the offender-specific aspects of § 3553(a).").

ing "cliffs" of varying severity depending on the ratio employed by any particular judge in that judge's courtroom.

The ultimate flaw with petitioner's approach, beyond the "discordant symphony" that would ensue from adopting it, *Booker*, 543 U.S. at 263, is that it cannot be reconciled with the 1986 Act. Under that approach, a court could give a distributor of heroin a lower sentence on the ground that distributors of identical amounts of marijuana and heroin should be given the same sentences; the only difference between that case and one in which a court gives a distributor of crack cocaine a lower sentence is that there may be stronger policy grounds on which to disagree with Congress's judgment concerning the relative severity of crack and powder offenses than its judgment concerning the relative severity of marijuana and heroin offenses.[14] Both of those judg-

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[14] Petitioner and his amici contend (Pet. Br. 44; NAACP Br. 4-13; NACDL Br. 23-24; Sentencing Project Br. 22-23) that the 100:1 powder-to-crack ratio disproportionately imposes longer sentences on minorities (especially blacks). Cf. 2007 Report 15-16 (noting that, as of 2006, 81.8% of crack-cocaine offenders are black, 8.8% are white, and 8.4% are Hispanic, whereas 57.5% of powder-cocaine offenders are Hispanic, 27.0% are black, and 14.3% are white). Petitioner and his amici do not contend, however, that use of the 100:1 powder-to-crack ratio would be unconstitutional on that basis, and all of the courts of appeals have long since rejected similar contentions. See, *e.g.*, *United States* v. *Johnson*, 40 F.3d 436, 439-441 (D.C. Cir. 1994), cert. denied, 514 U.S. 1041 (1995); *United States* v. *Singleterry*, 29 F.3d 733, 741 (1st Cir.), cert. denied, 513 U.S. 1048 (1994); *United States* v. *Moore*, 54 F.3d 92, 96-99 (2d Cir. 1995), cert. denied, 516 U.S. 1081 (1996); *United States* v. *Frazier*, 981 F.2d 92, 95 (3d Cir. 1992), cert. denied, 507 U.S. 1010 and 507 U.S. 1011 (1993); *United States* v. *D'Anjou*, 16 F.3d 604, 612 (4th Cir.), cert. denied, 512 U.S. 1242 (1994); *United States* v. *Watson*, 953 F.2d 895, 897-898 (5th Cir.), cert. denied, 504 U.S. 928 (1992); *United States* v. *Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993), cert. denied, 511 U.S. 1043 (1994); *United States* v. *Chandler*, 996 F.2d 917,

ments, however, are ones that Congress made in the 1986 Act—and courts therefore lack the discretion to disagree with them. See, *e.g.*, *United States* v. *Gaines*, 122 F.3d 324, 330 (6th Cir.) (noting that "[r]easonable minds can differ as to whether Congress * * * chose the best policy, but as long as the 100:1 ratio does not violate the Constitution, it is for Congress to make the policy choice"), cert. denied, 522 U.S. 962 (1997).

In sum, because "Congress incorporated the 100:1 ratio in the statutory scheme, rejected the Sentencing Commission's 1995 proposal to rid the guidelines of it, and failed to adopt any of the Commission's subsequent recommendations for easing the differential between crack and powdered cocaine," it is clear that "[t]he decision to employ a 100:1 crack-to-powder ratio rather than a 20:1 ratio, a 5:1 ratio, or a 1:1 ratio is a policy judgment, pure and simple." *Pho*, 433 F.3d at 62-63. That policy determination is one that courts, no less than the Sentencing Commission, are bound to respect.

C. Requiring Courts To Adhere To Congress's Policy Determinations Concerning Sentencing For Crack-Cocaine Offenses Would Not Reestablish Mandatory Guidelines Or Violate The Sixth Amendment

1. Petitioner and his amici repeatedly contend that the question presented in this case is whether district courts may disagree *with the Sentencing Guidelines* in imposing sentence for crack-cocaine offenses. See, *e.g.*, Pet. Br. 13; ACLU Br. 20-25; NACDL Br. 5, 11-13. That

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918-919 (7th Cir. 1993) (per curiam); *United States* v. *Lattimore*, 974 F.2d 971, 975-976 (8th Cir. 1992), cert. denied, 507 U.S. 1020 (1993); *United States* v. *Coleman*, 24 F.3d 37, 38-39 (9th Cir.), cert. denied, 513 U.S. 901 (1994); *United States* v. *Angulo-Lopez*, 7 F.3d 1506, 1508-1509 (10th Cir. 1993), cert. denied, 511 U.S. 1041 (1994); *United States* v. *King*, 972 F.2d 1259, 1260 (11th Cir. 1992) (per curiam).

contention fails, however, for the simple reason that, in adopting the relevant guidelines, the Sentencing Commission itself was bound by, and duly implemented, Congress's policy direction to sentencing courts with respect to the 100:1 ratio. Because this case involves a court's disagreement with a policy determination made by *Congress* in enacting sentencing statutes directed to the courts (and implemented by the Commission), not one made by the Commission in carrying out its general responsibility to implement the SRA, petitioner cannot bring himself within this Court's recognition that district courts may vary from the Guidelines based on a reasoned disagreement with Commission policy. See, *e.g.*, *Rita*, 127 S. Ct. at 2465 (noting that the parties may argue "that the Guidelines sentence should not apply * * * because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). Contrary to petitioner's contention (Br. 22), there is nothing peculiar about a regime that "allows sentencing courts to evaluate Commission judgments in the Guidelines, but prohibits them from taking into consideration the Commission's public and persistent declaration that the 100:1 ratio is flawed," in light of the fact that the 100:1 ratio was adopted (and thus can only be altered) by Congress.

2. A rule that prohibited district courts from reducing a defendant's sentence based on their disagreement with the 100:1 ratio would not "effectively reinstate the mandatory nature of the guideline applicable to [crack-cocaine] cases," as petitioner suggests (Br. 34). While the Sentencing Guidelines establish a base offense level for crack-cocaine offenses based on the 100:1 ratio, the ultimate Guidelines sentencing range remains advisory, and district courts may vary from that range based on any other consideration besides their disagreement with the 100:1 ratio, provided that the consideration is consis-

tent with Section 3553(a) (and upheld in subsequent reasonableness review). See, *e.g.*, *Castillo*, 460 F.3d at 361 (emphasizing that "district courts may give non-Guidelines sentences * * * because of case-specific applications of the § 3553(a) factors"). Specifically, district courts may rely on any facts, including (but not limited to) facts already reflected in the jury verdict or in the defendant's admissions, or on other policy considerations, in determining that an above- or below-Guidelines sentence is justified. See, *e.g.*, *Rita*, 127 S. Ct. at 2466 (emphasizing that a judge may sentence above the Guidelines range "in the absence of the special facts * * * which, in the view of the Sentencing Commission, would warrant a higher sentence within the statutorily permissible range"). Thus, for example, a court could disagree with the Guidelines' treatment of a crack offender's role in the offense, or (as was seemingly the case here) with the Guidelines' treatment of the offender's prior military service. The mere fact that there may be cases in which no such facts or policy considerations exist does not render the guideline for crack-cocaine cases "mandatory," any more than it does for the guidelines for any other types of offense.[15]

Contrary to petitioner's contention (Br. 14), courts would not be entirely prohibited from considering the Sentencing Commission's reports concerning sentencing

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[15] Petitioner contends (Br. 34 n.11) that there is "no practical difference" between the above standard and the standard under 18 U.S.C. 3553(b)(1) (Supp. IV 2004), the provision excised by *Booker*. That contention lacks merit. Under Section 3553(b)(1), a court could depart from the otherwise mandatory Guidelines range only if it found a fact not adequately taken into account by the Guidelines; under the above standard, a court can vary from the Guidelines range based on *any* fact or reasonable policy determination, other than a policy determination inconsistent with Congress's determination concerning the 100:1 ratio.

for crack-cocaine offenses. While courts could not rely on those reports as a basis for *categorically* disagreeing with the 100:1 ratio, courts could properly consider those reports in determining whether a *particular defendant's* commission of a crack-cocaine offense implicates the policy reasons underlying Congress's harsher treatment of crack offenses. See *United States* v. *Ricks*, No. 05-4832, 2007 WL 2068098, at *6 (3d Cir. July 20, 2007); *United States* v. *Jointer*, 457 F.3d 682, 687 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006); *Williams*, 456 F.3d at 1369. For example, one of the justifications for the 100:1 ratio was that crack cocaine is more closely correlated with the commission of other serious crimes (based on the greater propensity of individuals trafficking in crack to carry weapons). See, *e.g.*, United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 184-185 (1995). Accordingly, it would not be inconsistent with congressional policy for a court to conclude that, based on the individualized circumstance that a crack offender did not carry a weapon or otherwise threaten violence in connection with the offense, a downward variance would be appropriate.

3. Petitioner erroneously asserts (Br. 34-35) that a rule that prohibited district courts from reducing a defendant's sentence based on their disagreement with the 100:1 ratio would violate the Sixth Amendment. This Court has found guidelines systems inconsistent with the Sixth Amendment when they mandate some range, lower than the statutory maximum for the relevant offense, that the judge may lawfully exceed only by finding a fact beyond the "facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted); see *Cunningham* v. *California*, 127 S. Ct. 856, 869 (2007) (explain-

ing that the Sixth Amendment is violated "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term"). A court need not find any additional fact to sentence a crack offender outside the Guidelines range; instead, the court may vary upward (or downward) based on its own judgment about proper sentencing policy, as long as its policy judgment does not conflict with that of Congress (and is found valid on subsequent reasonableness review). Nothing in this Court's Sixth Amendment decisions requires that *every* conceivable policy judgment be available to the sentencing court. As long as the district court can sentence above the Guidelines range without finding an additional *fact*, a rule that takes a single policy consideration off the table presents no Sixth Amendment difficulty.

D. Because The District Court Reduced Petitioner's Sentence Based On Its Disagreement With The 100:1 Ratio, The Resulting Sentence Was Unreasonable

1. As explained above, see p. 26 & n.6, *supra*, where a court fails to comply with a congressional policy determination in imposing sentence, the resulting sentence will necessarily be unreasonable. In this case, although petitioner was subject to a statutory minimum sentence of 120 months on the crack-cocaine counts, petitioner's advisory Guidelines sentencing range was 168 to 210 months (with the increase from the statutory minimum resulting almost entirely from an adjustment for obstruction of justice and from petitioner's criminal history). In sentencing petitioner to the statutory minimum on the crack-cocaine counts, however, the court primarily relied on its disagreement with the disparity in sentences for crimes involving crack and powder cocaine. The court cited the "disproportionate and unjust

effect that crack cocaine guidelines have in sentencing." J.A. 72. "This case," according to the court, "is another example of how the crack cocaine guidelines are driving the offense level to a point higher than is necessary to do justice." *Ibid.* The court added that "[i]t's amazing that when the Court goes back and calculates the offense in this case using powder cocaine, because we are dealing with cocaine at the end of the day in this case, the level, the guidelines range comes down so significantly that it's unbelievable." J.A. 74. The court reasoned that a lower sentence was necessary in order to "avoid imposing an unwarranted disproportionate sentence." *Ibid.* The district court therefore evidently sentenced petitioner in significant part based on its rejection of the 100:1 ratio adopted by Congress.

Petitioner seemingly (and tellingly) concedes (Br. 32 n.9) that it would be improper for a sentencing court to announce a different ratio of its own, but nevertheless contends that the district court acted reasonably because it did not do so here. But where, as here, a sentencing court rejects the 100:1 ratio, it does not matter whether the court acts transparently in announcing the ratio that it is applying, applies a different ratio *sub silentio*, or implicitly adopts an unspecified ratio; in all of those cases, the court effectively "revise[s] the 100:1 ratio." *Ibid.* Although it is impossible in this case to isolate the ratio that the district court used (in light of the fact that the district court did not articulate a ratio and relied in addition on other factors in imposing sentence), it is clear that the district court's disagreement with the congressional policy formed a critical factor that drove its analysis. The Court emphasized the disparity created by the differential treatment of crack and powder cocaine, even though both are "cocaine at the end of the day." J.A. 74. Indeed, the district court sug-

gested that, were it not bound by the statutory minimum, it would have applied a 1:1 ratio. *Ibid.* Where a sentencing court relies in whole or in part on its disagreement with the 100:1 ratio, regardless whether it articulates an explicit alternative ratio of its own, it commits legal error.

2. As petitioner notes (Br. 45-46), the district court also cited petitioner's limited criminal history, his work history, and his prior military service in imposing a below-Guidelines sentence. J.A. 73, 74. Because the district court primarily relied on its disagreement with the disparity in sentences for crimes involving crack and powder cocaine, however, the court of appeals correctly vacated the sentence and remanded for resentencing. Cf. *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (holding that, when a court of appeals concludes that the district court "relied upon an invalid factor at sentencing," it should remand for resentencing unless it concludes that "the error did not affect the district court's selection of the sentence imposed"). On remand, the district court should consider whether the remaining factors on which it relied justify a below-Guidelines sentence, and, if so, the extent of an appropriate variance. Should the district court conclude that a downward variance is warranted, that sentence will be subject to reasonableness review in any subsequent appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 3553 of Title 18 of the United States Code (2000 & Supp. IV 2004) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or

policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In general.

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[1] So in original. The period probably should be a semicolon.

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses

(A)[2] Sentencing

In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

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[2] So in original. No subpar. (B) has been enacted.

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in

camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

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[3] So in original.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 944, 846) or section 1010 or 103 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

3. Section 841 of Title 21 of the United States Code (2000 & Supp. IV 2004) provides:

Prohibited acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18,

or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-

phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at

least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual,

or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding

section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) DEFINITION.—For purposes of this paragraph, the term "without that individual's knowl-

edge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

4. Public L. No. 104-38, 109 Stat. 334, provides:

SECTION 1. DISAPPROVAL OF AMENDMENTS RELATING TO LOWERING OF CRACK SENTENCES AND SENTENCES FOR MONEY LAUNDERING AND TRANSACTIONS IN PROPERTY DERIVED FROM UNLAWFUL ACTIVITY.

In accordance with section 994(p) of title 28, United States Code, amendments numbered 5 and 18 of the "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary", submitted by the United States Sentencing Commission to Congress on May 1, 1995, are hereby disapproved and shall not take effect.

SECTION 2. REDUCTION OF SENTENCING DISPARITY.

(a) RECOMMENDATIONS.—

(1) IN GENERAL.—The United States Sentencing Commission shall submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and like offenses, including unlawful possession, possession with intent to commit any of the forgoing offenses, and attempt and conspiracy to commit any of the forgoing offenses. The recommendations shall reflect the following considerations—

(A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine;

(B) high-level wholesale cocaine traffickers, organizers, and leaders, of criminal activities should generally receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(C) if the Government establishes that a defendant who traffics in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(D) an enhanced sentence should generally be imposed on a defendant who, in the course of an offense described in this subsection—

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon;

(iii) uses or possesses a firearm;

(iv) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(v) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate his drug trafficking activities;

(vi) knows, or should know, that he is involving an unusually vulnerable person;

(vii) restrains a victim;

(viii) traffics in cocaine within 500 feet of a school;

(ix) obstructs justice;

(x) has a significant prior criminal record; or

(xi) is an organizer or leader of drug trafficking activities involving five or more persons.

(2) RATIO.—The recommendations described in the preceding subsection shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and

guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a) of title 28 United States Code.

(b) STUDY.—No later than May 1, 1996, the Department of Justice shall submit to the Judiciary Committees of the Senate and House of Representatives a report on the charging and plea practices of Federal prosecutors with respect to the offense of money laundering. Such study shall include an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute. The Sentencing Commission shall submit to the Judiciary Committees comments on the study prepared by the Department of Justice.

5. Section 2D1.1 of the United States Sentencing Commission Guidelines provides in relevant part:

§ 2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after

one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer

aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.

(6) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

(7) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

(8) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(9) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder) or § 2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to

that individual, an adjustment under § 3A1.1(b)(1) shall apply.

(c) DRUG QUALITY TABLE

	Controlled Substances and Quantity*	Base Offense Level
1)	● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● 1.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam.	**Level 38**
2)	● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 500 G but less than 1.5 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);	**Level 36**

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- At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3) **Level**

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 150 G but less than 500 G of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

(4) **Level 32**

- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 50 G but less than 150 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

(5) **Level 30**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;

- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(6) **Level**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 20 G but less than 35 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7) **Leve**

- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 5 G but less than 20 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);

- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(8)
- At least 80 G but less than 100 G of Heroin; **Level 24**
- At least 400 G but less than 500 G of Cocaine;
- At least 4 G but less than 5 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;

- At least 5,000 but less than 6,250 units of Flunitrazepam.

(9) **Level**

- At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 3 G but less than 4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

(10) **Level**

- At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 2 G but less than 3 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- 40,000 or more units of Schedule III substances;
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11) **Level 18**

- At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
- At least 1 G but less than 2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl;
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances;
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(12) **Level 16**

- At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
- At least 500 MG but less than 1 G of Cocaine Base;

- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
- At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl;
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III substances;
- At least 625 but less than 1,250 units of Flunitrazepam.

(13)
- At least 5 G but less than 10 G of Heroin;
- At least 25 G but less than 50 G of Cocaine;
- At least 250 MG but less than 500 MG of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressa

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- At least 5,000 but less than 10,000 units of Schedule III substances;
- At least 312 but less than 625 units of Flunitrazepam.

(14) **Level 12**

- Less than 5 G of Heroin;
- Less than 25 G of Cocaine;
- Less than 250 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances;
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15) **Level 10**

- At least 1 KG but less than 2.5 KG of Marihuana;
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III substances;
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16) **Level 8**

- At least 250 G but less than 1 KG of Marihuana;
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;

- At least 250 but less than 1,000 units of Schedule I or II Depressants;
- At least 250 but less than 1,000 units of Schedule III substances;
- Less than 62 units of Flunitrazepam;
- At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- 40,000 or more units of Schedule V substances.

(17)
- Less than 250 G of Marihuana;
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 250 units of Schedule I or II Depressants;
- Less than 250 units of Schedule III substances;
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

Level

[notes to drug quantity table omitted]

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COMMENTARY

APPLICATION NOTES

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10. The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically

referenced in the Drug Quantity Table, determine the base offense level as follows:

(A) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.

(B) Find the equivalent quantity of marihuana in the Drug Quantity Table.

(C) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are

controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

Examples:

a. *The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.*

b. *The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.*

c. *The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equiva-*

lent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.

d. *The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.*

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana

1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylline =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P_2P (in any other case) =	75 gm of marihuana
1 gm of Cocaine Base ("Crack") =	20 kg of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin(Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxy-amphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-	

ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/ PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

Flunitrazepam**

1 unit of Flunitrazepam =	16 gm of marihuana

***Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =	1 gm of marihuana

Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid =	8.8 gm of marihuana

Schedule III Substances***

1 unit of a Schedule III Substance =	1 gm of marihuana

****Provided*, that the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule IV Substances (except flunitrazepam)****

1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm of marihuana

*****Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances*****

1 unit of a Schedule V Substance =	0.00625 gm of marihuana

******Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)******

1 gm of Ephedrine =	10 kg of marihuana
1 gm of Phenylpropanolamine =	10 kg of marihuana
1 gm of Pseudoephedrine =	10 kg of marihuana

******Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
l gm = 1 ml (liquid)
1 liter - 1,000 ml
1 kg - 1,000 gm
1gm = 1,000 mg
1 grain = 64.8 mg.

* * * * *

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal his-

tory, and whether death or serious bodily injury resulted from the offense.

The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP.

Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the

weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. None the-less, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; § 5G1.1(b)).

Subsection (b)(8)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections (b)(8)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.

(3)

No. 06-6330

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. Since its founding in 1920, fair and sound criminal sentencing has been a central concern of the ACLU, which has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*. Of particular concern here, the ACLU has joined the U.S. Sentencing Commission in criticizing the 100:1 disparity in federal sentencing for crack-cocaine and powder-cocaine offenses. The ACLU respectfully submits this *amicus* brief because that disparity and the sentencing issues it raises are central to the proper resolution of this case.

STATEMENT OF THE CASE

A federal grand jury in the Eastern District of Virginia charged Petitioner Derrick Kimbrough with, *inter alia*, conspiring to possess with intent to distribute both powder cocaine and crack, as well as with possession with intent to distribute both of those substances. JA 8-12. Petitioner pled guilty to the charges without signing a plea agreement. JA 29-37, 76. Based on Petitioner's possession of 92.1 grams of powder cocaine and 56 grams of crack cocaine, as well as his relatively minor criminal history, the

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[1] Petitioner has submitted a blanket consent to the filing of *amicus* briefs. Respondent's consent to the filing of this *amicus* brief has been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* state that no counsel for a party authored this brief in whole or in part and no person other than *amicus*, its members or counsel, made any monetary contribution to the preparation or submission of this brief.

Sentencing Guidelines ("Guidelines") for the cocaine offenses recommended a range of 168 to 210 months of imprisonment. JA 68.

Petitioner objected to the Guidelines calculation, primarily due to the severity of the sentence recommended by the Guidelines. JA 69-71. While he agreed that a mandatory-minimum sentence of 120 months would apply to his crack offenses pursuant to 21 U.S.C. § 841, Petitioner argued that any sentence that exceeded the mandatory minimum would not reflect the "seriousness of the offense," "promote respect for the law," "provide adequate proportionality," and "avoid unwarranted sentencing disparit[ies]." JA 70 (referencing the factors provided in 18 U.S.C. § 3553(a)(2)). Petitioner noted at the sentencing hearing:

> Even the U.S. Sentencing Commission admitted in its 2002 report to Congress that the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity mostly impacts minorities, which, of course, for the record Mr. Kimbrough is one.

JA 70.

The sentencing court agreed that the sentence recommended by the Guidelines, which was longer than the mandatory-minimum sentence, was excessive and unsound. JA 74-75. The court first recounted the goals of sentencing and then found that the crack Guideline both generally and as it related to

the Petitioner did not effectuate these goals. JA 72. It recognized that the Guideline for crack offenses "dr[ove] the offense level to a point higher than is necessary to do justice in this case." *Id.*; *see also* JA 74 (noting further that "when the Court goes back and calculates the offense in this case using powder cocaine, because we are dealing with cocaine at the end of the day in this case, the level, the guideline range comes down so significantly that it's unbelievable"). The court also acknowledged that "the Sentencing Commission [has] recognize[d] that crack cocaine has not caused the damage that the Justice Department alleges it has . . . ." JA 72. Accordingly, the sentencing court found that "should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish . . . ." JA 74; *see also* JA 72 ("[T]o impose a sentence of 19 to 22 years in this case is ridiculous."). Accordingly, and abiding by the applicable mandatory-minimum sentence, the court imposed a sentence of ten years imprisonment for the drug offenses. JA 75.

The Government appealed the sentence to the United States Court of Appeals for the Fourth Circuit. JA 94-95. Prior to hearing Petitioner's case, the Fourth Circuit issued its opinion in *United States v. Eura*, 440 F.3d 625, 632-34 (4th Cir. 2006), which held that a district court commits reversible error when it imposes a sentence below the suggested Guideline range in a crack case due to disagreement with the crack Guideline or agreement with the Sentencing Commission's statements regarding that Guideline. In light of *Eura*, the Court of Appeals vacated Petitioner's sentence "[b]ecause the district court concluded that the crack to powder cocaine

disparity warranted a sentence below the applicable sentencing guideline range . . . ." JA 98.

SUMMARY OF ARGUMENT

This brief addresses three interconnected issues: (1) a sentencing judge's proper role in evaluating the soundness of the Sentencing Guideline for a category of offenses (in this case, crack sentences); (2) the criteria a sentencing judge should consider in making such an evaluation; and (3) the bases for rendering an appropriate sentence when the sentencing judge concludes that a particular Guideline sentence is unsound. Leaving to the parties and other *amici* the task of explicating the broader aspects of sentencing in this matter, this brief focuses on the ability of—and basis for—a sentencing court to reject the now-advisory guidance of the Sentencing Commission in imposing a sentence for crack offenses.

Because the advisory Sentencing Guideline for crack reflects an unsound judgment based on disproved assumptions, the district court here properly exercised discretion in imposing a sentence below the Guideline calculation. Federal courts and the Sentencing Commission have recognized that the Sentencing Guideline either generally recommends a sentence greater than necessary for crack offenders or, at the very least, recommends a sentence greater than necessary for many such offenders. When a sentencing court comes to this recognition, it is compelled by the plain meaning of the federal sentencing statute to impose a sentence below the Guideline recommendation.

In general, the Guidelines reflect an effort to construct sentences that are appropriate for mine-run

offenses[2] and mine-run offenders based on empirical evidence and historical sentencing practices. In calculating the Guideline sentence for any specific offense, Congress and the Sentencing Commission sought to understand both the ramifications of committing that offense and the prototypical person who engages in the offense. That methodology is not an issue in this case. Rather, this case presents the question of how sentencing courts deal with the crack Guideline, given the demonstrably false predicate understandings of the nature of that particular offense and the person who typically commits that offense.

Justice Breyer, writing for the Court in *Rita*, clarified that one aspect of the district court's current (i.e., post-*United States v. Booker*, 543 U.S. 220 (2005)) sentencing mandate is to address arguments "that the Guidelines reflect an unsound judgment." 127 S. Ct. at 2468. Evaluation of the soundness of a Guideline finds support in the residual federal sentencing statute, which compels a sentencing court to assess a number of factors that effectively test whether the Guideline recommends an appropriate sentence. Because the Guideline for crack offenses is premised on assumptions that are widely acknowledged to be factually incorrect, sentencing courts around the country have permissibly exercised their discretion by declining to impose a within-

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[2] *See Rita v. United States*, 127 S. Ct. 2456, 2469 (2007) ("We acknowledge that the judge might have said more. He might have added explicitly that . . . he thought the Commission in the Guidelines had determined a sentence that was proper in the minerun of roughly similar perjury cases . . . ."); *id.* at 2476 (Stevens, J., concurring) ("[S]ome lengthy sentences will be affirmed (*i.e.*, held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run.").

Guideline sentence for mine-run crack offenses and on mine-run crack offenders.

I. *BOOKER*, *RITA*, AND THE FEDERAL SENTENCING STATUTE MAKE CLEAR THAT A SENTENCING JUDGE HAS DISCRETION TO ASSESS IF A GUIDELINE SENTENCE REFLECTS AN UNSOUND JUDGMENT.

As a result of *Booker*, sentencing courts have been accorded a substantial degree of discretion when imposing criminal sentences. This discretion, as provided in the residual sentencing statute and explicated in *Rita*, calls upon sentencing courts to assess if the applicable Guideline reflects an unsound judgment.

Prior to *Booker*, sentencing courts were required by Congress to impose sentences within the Guidelines range, *Booker*, 543 U.S. at 223, barring exceptional circumstances specific to the individual offender, *see, e.g.*, *id.* at 234 (citing 18 U.S.C. § 3553(b)). District courts were not permitted to account for instances when the Guideline sentence for a specific offense failed to effectuate the broad sentencing goals articulated by Congress in 18 U.S.C. § 3553(a). Even after the Sentencing Commission had rejected the soundness of the crack Guideline as a general matter, sentencing judges pre-*Booker* effectively had no choice but to follow the Guideline when sentencing a typical crack offender.

Booker substantially altered the landscape of sentencing. The "remedial opinion" in *Booker* struck from the federal sentencing statute the provision that mandated the imposition of within-Guidelines sentences. 543 U.S. at 259-60 (excising 18 U.S.C.

§ 3553(b) and a related sub-section concerning standards for appellate review). While allowing sentencing courts to continue to make factual findings, *Booker*'s remedial opinion cured the statute of constitutional infirmity by requiring that the Guidelines become merely advisory. The sentencing court can no longer "presum[e] that the Guidelines sentence should apply." *Rita*, 127 S. Ct. at 2465; *see also Cunningham v. California*, 127 S. Ct. 856, 866 (2007) (stating that a court is "no longer . . . tied to the sentencing range indicated in the Guidelines"); *Booker*, 543 U.S. at 259-60.

Although the full parameters of a district court's sentencing discretion remains a topic of broad debate, this Court recently clarified that one aspect of sentencing discretion includes the ability (if not the duty) to assess whether the Guideline applicable in a given case "reflect[s] an unsound judgment." *Rita*, 127 S. Ct. at 2468 (citing 18 U.S.C. § 3553(a)). The debate between the courts of appeals and the district courts has revolved around the substantive standard for assessing whether a particular Guideline is unsound, and how sentencing courts should proceed upon finding that the Guideline is in fact unsound for a particular offense or a particular offender. The remainder of *amicus*' brief is dedicated to addressing those questions.

II. THE SENTENCING GUIDELINES DERIVE THEIR SOUNDNESS—FOR MANY OFFENSES, BUT NOT CRACK OFFENSES—BY USING EMPIRICAL, HISTORICAL DATA.

The Guidelines stem from years of data collection, study, analysis and debate among the members of the Sentencing Commission, all with the

aim of creating sound sentencing ranges. For most offenses, the Guidelines are based on empirical and historical information gathered by the Commission, and the Guidelines attempt a sound sentencing range based on the objective, quantifiable information considered by the Sentencing Commission.

The Guideline for crack offenses, however, admittedly is not founded on such objective criteria. Instead, the Commission devised a Guideline that recommends exceedingly long sentences based on suppositions that have turned out to be false, providing cause for sentencing courts to reasonably question the soundness of the Guideline in crack cases.

A. The Sentencing Commission Developed Sentencing Guidelines For Most Offenses Based On Empirical, Historical Data.

Prior to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, criminal sentences were indeterminate—for example, ten-to-thirty years, or not in excess of ten years imprisonment, with the actual release date within that span determined by a parole board. Within the statutory range, sentencing courts had discretion to impose whatever term of imprisonment they saw fit. No rule of law required sentencing courts to justify the sentences they imposed, and appellate review was effectively unavailable. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687-90 (1992).

Sentencing courts presumably considered many of the factors that sentencing courts today are required to consider pursuant to the federal sentencing statute, 18 U.S.C. § 3553(a), but their assessments were based upon a limited and varied set of data—

and, to a considerable degree, upon each judge's own experience and accumulated anecdotes. *Blakely v. Washington*, 542 U.S. 296, 332 (2004) (Breyer, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 363 (1989). Each sentencing judge deployed his or her own sentencing philosophy, whether premised on deterrence, just deserts, rehabilitation, or the like. *See, e.g., Williams v. New York*, 337 U.S. 241, 248 n.13 (1949). Necessarily, each judge brought to bear a subjective notion of social harm attached to a given category of offenses. *Id.* In other words, each sentencing court was called upon to develop, for each offense, its own notion of a mine-run offense and mine-run offender; based on this anecdotal and subjective information, the court would then evaluate where a particular defendant fit within that scheme.

In 1984, Congress created a Sentencing Commission to "establish sentencing policies and practices . . . that assure the meeting of the purposes of sentencing . . . ." 28 U.S.C. § 991(b). The Commission, setting out to devise Guidelines for all federal offenses, embarked on a monumental empirical and historical examination regarding past sentencing practices, the harm that flows from the mine-run offense for that particular crime, and the mine-run offender who commits that crime. Adam Lamparello, *Implementing the "Heartland Departure" in a Post-*Booker *World*, 32 AM. J. CRIM. L. 133, 165 (2005); *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 n.50 (1987). To this end, it analyzed detailed data from 10,000 pre-sentence investigations and less detailed data from 100,000 criminal dispositions over a two-year period "in order to determine which [sentencing] distinctions are important in present practice." U.S. SENTENCING

GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 3, at 1.4 (1987); *see also* U.S. Sentencing Comm'n, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16-39 (1987) (explaining the Sentencing Commission's empirical approach to the initial Guidelines). Grounding the Guidelines in historical and empirical support lay at the foundation of the Commission's efforts to create sound sentencing policy.

B. The Sentencing Guideline For Crack Offenses Is Not Based On Empirical Data, But Rather On Assumptions That Are Now Widely Recognized As Demonstrably False.

The Guidelines for drug offenses, unlike the Guidelines for most offenses, are uniquely without grounding in objective empirical and historical criteria. For crack offenses, the Guideline is based on assumptions that are widely acknowledged—even by the Sentencing Commission itself—to be incorrect.

The Commission set out to create the Guidelines for drug offenses against the backdrop of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. Included as part of the 1986 Act was 21 U.S.C. § 841, which prescribed mandatory-minimum sentences for various drug-trafficking offenses. Importantly, the applicability of a mandatory-minimum sentence for a particular trafficking offense was triggered by the weight of the "mixture or substance containing a detectable amount" of the subject drug. 21 U.S.C. § 841(b).

As the D.C. Circuit recently recognized, this statutory scheme "created a problem for the Commission" because "mandatory minimum sentencing statutes are inconsistent with the objectives of the Guidelines to provide 'a substantial degree of individualization in determining the

appropriate sentencing range' and to impose 'graduated, proportional increases in sentence severity for additional misconduct or prior convictions.'" *United States v. Pickett*, 475 F.3d 1347, 1349 (D.C. Cir. 2007) (quoting U.S. Sentencing Comm'n, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 25 (1991)).

In other words, the Sentencing Commission encountered a structural problem unique to drug offenses. At least in setting the initial drug-offense Guidelines, the Sentencing Commission abandoned the methodology of describing the mine-run drug offense and mine-run drug offender for each type of drug offense, and then matching that prototypical offense and offender with a historical, empirical sentence. Rather, the Commission viewed its charge as creating a mechanical, ahistorical grid that takes as input only the quantity of drug, type of drug, and a mandatory-minimum sentence prescribed by Congress. Given that the mandatory-minimum statute contained a 100:1 ratio of triggering quantities for the crack form of cocaine compared to the powder form of cocaine, the Commission chose (though was not required) to adopt this same ratio.

The crack Guideline was necessarily based on even less information than the Guidelines for other drug offenses. Crack was a relatively new drug at the time that the Commission devised the crack Guideline. *See, e.g.*, U.S. Dep't of Justice, IDENTIFYING AND RESPONDING TO NEW FORMS OF DRUG ABUSE: LESSONS LEARNED FROM "CRACK" AND "ICE" 33 (1994) (noting that the first major news stories about crack appeared in 1985). The Commission—like the judiciary—had very little experience with crack when it set out to craft the Guideline for crack offenses. Accordingly, the

Commission did not have the benefit of much information about crack and prototypical crack offenders when it created the Guideline for this offense. *See, e.g.*, U.S. Sentencing Comm'n, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 122 (1995) ("1995 Report") ("At the time [1986], however, there were no prevalence statistics on the use of crack."). In attempting to create sound sentencing for crack offenses, therefore, the Commission had to make a number of assumptions about the harmfulness of crack, the mine-run crack offense, and the mine-run federal crack offender.

Specifically, the crack Guideline was based primarily on the following assumptions about crack and the mine-run crack offense: (1) crack was highly addictive relative to powder cocaine; (2) there was a direct relationship between crack trafficking and violent crime; (3) crack's pre-natal effects were relatively significant; (4) crack traffickers were co-opting youth into the trafficking operation; (5) crack distributors were selling crack to young people, which would cause a generation of Americans to become addicted to the substance; and (6) crack was a relatively pure form of cocaine with a relatively low cost per dose. U.S. Sentencing Comm'n, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9-10 (2002). Furthermore, extraordinarily long sentences were deemed appropriate due to the assumption that mine-run federal crack offenders would be "kingpin" traffickers. 1995 Report, at 118.[3]

Twenty years after the promulgation of the 100:1 ratio, it is universally understood that these

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[3] See Brief of *Amicus Curiae* Sentencing Project for a thorough examination of the assumptions that underlie the crack Guideline.

assumptions were factually incorrect. With the benefit of further research, expert testimony, and more experience with crack offenses in the criminal-justice system, even the Sentencing Commission has concluded that the 100:1 ratio (1) seriously overstates the harm of crack offenses relative to powder-cocaine offenses, and (2) rests on an inaccurate profile of the mine-run federal crack offender.

In 2007, the Commission undertook a meticulous review of the bases for the crack Guideline, "thoroughly examin[ing] the results of its own extensive data research project, review[ing] the scientific and medical literature, consider[ing] written public comment and expert testimony at public hearings that included representatives of the Executive Branch, the Judiciary, the medical and scientific communities, state and local law enforcement, criminal justice practitioners, academics, and community interest groups, and survey[ing] state cocaine sentencing policies." U.S. Sentencing Comm'n, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6-7 (2007). After this painstaking examination, the Commission came to the following four conclusions:

- The current quantity-based penalties overstate the relative harmfulness of crack compared to powder cocaine.
- The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.
- The current quantity-based penalties overstate the seriousness of most crack offenses and fail to provide adequate proportionality.
- The current severity of crack penalties mostly impacts minorities.

Id. at 8.

III. WHERE A SENTENCING GUIDELINE FOR A PARTICULAR OFFENSE IS NOT BASED ON EMPIRICAL DATA, A COURT SHOULD MEASURE THE SOUNDNESS OF THE GUIDELINE BY ASSESSING IT IN LIGHT OF THE FACTORS SPECIFIED IN THE RESIDUAL SENTENCING STATUTE.

The residual sentencing statute left in place by *Booker* not only directs sentencing courts to assess the soundness of a Guideline sentence for a particular offense, but also provides a number of factors that sentencing courts should consider in order to determine the soundness of the Guideline. These factors must be accorded independent weight by a sentencing court and provide the means for the court to test the general soundness of the Guideline for a particular offense.

Booker, which excised 18 U.S.C. § 3553(b) from the federal sentencing statute, left in place a sentencing scheme whose only ultimate command is that the sentencing judge in each case "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing]." 18 U.S.C. § 3553(a). The residual sentencing statute provides guidance for the sentencing-court's assessment of whether a sentence is sound, listing seven factors for consideration.[4]

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[4] Title 18 U.S.C. § 3553(a) provides:

Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)

The residual statute mentions all seven factors on equal footing, none elevated over any other. *Id.* By the plain language of the statute, there is no "super-factor;" neither the Sentencing Guidelines nor any other factor predominates. This plain-language interpretation—that no factor is accorded greater significance than another—is conclusive. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 507 (1993) (rejecting an interpretation of a statute because it was "at odds with [the statute's] plain language"); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1821) ("[W]here the words of a law . . . have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense . . . .").

The Government has argued consistently in crack cases that the Guideline must be assigned significance beyond the six other § 3553 factors. This contention,

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of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for (A) the applicable category of offense committed by the applicable category of defendant as set forth in the [sentencing] Guidelines . . .;

(5) any pertinent policy statement . . . issued by the Sentencing Commission . . .;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

however, derives from a statute that no longer exists—the sentencing statute that, prior to *Booker*, included former section (b). *See* 18 U.S.C. § 3553(b) (making the Guidelines mandatory), *stricken as unconstitutional by Booker*, 543 U.S. at 260. With § 3553(b) excised, the residual statute must be read to put all of the factors on equal footing. *See* 18 U.S.C. § 3553(a); *see also Pickett*, 475 F.3d at 1353 ("[N]either the Supreme Court nor the statute assigns any weight or ranking to the factors.").

Many of the co-equal § 3553 factors ask sentencing courts to evaluate the Guidelines as they relate to an applicable offense *generally*, and not just to assess the *individual characteristics* of the particular offender being sentenced. These general factors provide benchmarks for sentencing courts to test whether the 100:1 ratio is generally supportable—whether the Commission's original assumptions about crack offenses have proven correct.

While certain of the § 3553 factors undoubtedly relate solely to the specific offender before the sentencing court, others just as clearly call for general observations about the suggested Guideline sentence for the particular offense. Included among the former category are 18 U.S.C. § 3553(a)(1) ("the history and characteristics of the defendant"), 18 U.S.C. § 3553(a)(2)(C) ("to protect the public from further crimes of the defendant"), and 18 U.S.C. § 3553(a)(7) ("the need to provide restitution to any victims of the offense"). On the other hand, even more § 3553 factors do not focus on the particulars of any one offender, and instead direct sentencing courts to assess whether the Guideline for a given offense is generally sound. For example, 18 U.S.C. § 3553(a)(2)(A) requires the sentencing court to consider whether the sentence "reflect[s] the

seriousness of the offense," "promote[s] respect for the law," and "provide[s] just punishment for the offense." Sub-section (a)(2)(B) requires that the sentence "afford adequate deterrence to criminal conduct. 18 U.S.C. § 3553(a)(2)(B). Another factor that a sentencing court must consider is "the nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1), which is, importantly, listed separately from the "history and characteristics of the defendant," *id.* Additionally, the court is directed to consider policy statements of the Sentencing Commission concerning the Guideline for the offense that the defendant committed. 18 U.S.C. § 3553(a)(5).

The D.C. Circuit and numerous sentencing courts around the country have explicitly recognized that many § 3553 factors are not limited to the particular offender being sentenced, but encompass larger concerns about the Guideline for a specific offense. In *Pickett*, the D.C. Circuit noted that, "[w]ith the possible exception of § 3553(a)(2)(C) & (D), the broadly stated purposes of sentencing set forth in § 3553(a)(2) are not confined to any particular defendant's situation." 475 F.3d at 1352 n.4. A number of § 3553 factors, the court found, "do[] not rest on the particulars of any one offender." *Id.* at 1354. Sentencing courts across the country have arrived at similar conclusions. *See, e.g., United States v. Williams*, 481 F. Supp. 2d 1298, 1304 (M.D. Fla. 2007) ("While the sale of crack cocaine is a serious offense, severity is a relative concept, and a guideline sentence of 30 years would be grossly disproportionate to the seriousness of this offense. It would not provide just punishment. Indeed, in this case, I find that it offends the very notion of justice. As such it would obviously not promote respect for the law. These factors therefore weigh heavily

against the imposition of a guideline sentence."); *United States v. Repp*, 464 F. Supp. 2d 788, 790 n.4 (E.D. Wis. 2006) ("Evaluation of the need for general deterrence involves what is, in effect, a policy consideration, i.e., what sort of sentence will be sufficient to deter others who may be tempted to engage in similar criminal conduct."); *United States v. Fisher*, 451 F. Supp. 2d 553, 563 (S.D.N.Y. 2005) ("I find that the 100:1 ratio creates unwarranted sentencing disparities and, in so doing, violates sections 3553(a)(2)(A) and (a)(6)."); *United States v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) ("This arbitrary and discriminatory disparity between powder and crack cocaine implicates the Section 3553(a)(2)(A) factors."); *United States v. Perry*, 389 F. Supp. 2d 278, 304 (D. R.I. 2005) ("[W]hen a Guideline sentence involves a nearly impossible-to-justify disparity [between crack and powder-cocaine offenses], the sentence neither accurately reflects the seriousness of the offense, nor promotes general respect for the criminal justice system."); *United States v. Leroy*, 373 F. Supp. 2d 887, 892 (E.D. Wis. 2005) ("In light of these well-supported findings by the Commission, a court acts well within its discretion under § 3553(a) in sentencing below the guideline range to account for the unreasonable inflation of sentences called for in crack cases."); *Simon v. United States*, 361 F. Supp. 2d 35, 47, 49 (E.D.N.Y. 2005).

Acknowledging that many of the § 3553 factors require the sentencing court to assess the general soundness of a Guideline does not, as the Government will undoubtedly argue, thwart the "will of Congress."[5] Rather, Congress has expressly

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[5] Nor does it ignore "the need to avoid unwarranted sentence disparities among defendants with similar records who have

authorized sentencing courts to test the soundness of the Guideline for any particular offense under the residual sentencing statute. Courts that recognize a systematic problem with the sentencing Guideline for crack offenses are not registering a policy or political disagreement with Congress or the Sentencing Commission; they are simply following a Congressional mandate to evaluate all sentences in light of the factors set forth in § 3553. These sentencing courts are not frustrating the will of Congress. To the contrary, they are abiding by the plain language of the residual sentencing statute, which expressly directs courts not to impose a sentence that is greater than necessary.

In *Pickett*, the D.C. Circuit directly confronted the Government's contention that rejecting the crack Guideline would "frustrate 'the will of Congress.'" 475 F.3d at 1354. The court of appeals held that congressional will was not impeded when sentencing courts "take into account the untoward results of the 100-to-1 ratio" so long as the court abides by the

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been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). While other *amici* will discuss at length the meaning of this factor, *amicus* notes that 21 U.S.C. § 841 applies in most crack-cocaine cases, U.S. Sentencing Comm'n, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 106, 324 (2006) (table 43) (reporting that approximately 80% of crack offenders are subject to a mandatory-minimum sentence), assuring a mandatory-minimum sentence for the vast majority of crack offenders and increasing the uniformity of crack sentences. With the mandatory minimum as a sentencing floor, most sentencing judges who find that the Guideline recommends an unsound sentence for crack offenses will elect merely not to elevate sentences further above the applicable mandatory minimum. As such, they have minimal impact on uniformity among crack sentences, while actually *lessening* the racial and other unwarranted disparities between sentences for crack and sentences for other similarly culpable or harmful conduct.

mandatory-minimum sentence prescribed by Congress. *Id.* at 1354-55. Indeed, that result respects both the mandatory-minimum statute and the plain language of the residual sentencing statute. *Cf. United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006).[6] In short, a sentencing court does not frustrate Congressional will when, based on the § 3553 factors, it rejects the Guideline for crack offenses, all the while imposing a period of incarceration that does not fall below any applicable mandatory-minimum sentence. What the Government labels as improper policy-making in defiance of Congressional intent turns out to be the only way to honor the plain language of the residual sentencing statute.

IV. SENTENCING COURTS HAVE BROAD DISCRETION TO IMPOSE A BELOW-GUIDELINE SENTENCE WHEN IT DEEMS A GUIDELINE SENTENCE UNSOUND.

After finding that the applicable Guideline calculation reflects an unsound judgment, a district court enjoys considerable discretion to discount the weight afforded the Guideline—or to assign it no weight at all—in crafting a sentence that accounts for the totality of factors enumerated in § 3553(a).

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[6] *Amicus* recognizes that some circuits have disagreed with this conclusion. *See, e.g., United States v. Ricks*, -- F.3d --, 2007 WL 2068098 (3d Cir. July 20, 2007); *United States v. Spears*, 469 F.3d 1166, 1178 (8th Cir. 2006) (en banc); *United States v. Pope*, 461 F.3d 1331, 1335-37 (11th Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 357-60 (2d Cir. 2006); *United States v. Jointer*, 457 F.3d 682, 686-87 (7th Cir. 2006); *Eura*, 440 F.3d at 633-34; *United States v. Pho*, 433 F.3d 53, 62-63 (1st Cir. 2006). However, *amicus* believes that *Pickett* and *Gunter* provide the proper analysis and reach the correct result.

Although the Court was divided in *Rita* about the appropriate scope of *appellate* review after *Booker*, the Court was unanimous in its recognition that *Booker* bestowed upon *district courts* broad discretion in sentencing. 127 S. Ct. at 2465 ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."); *id.* at 2474 (Steven, J., concurring) ("I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory."); *id.* at 2478 n.3 (Scalia, J., concurring) (stating that district courts' sentencing discretion "is a proper goal—indeed, an essential one to prevent the *Booker* remedy from effectively overturning *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] and *Blakely*."); *id.* at 2488 (Souter, J., dissenting) ("[D]istrict courts [must] be assured that the entire sentencing range set by statute is available to them.") This broad sentencing discretion includes the authority to disagree with the Guidelines themselves.

In exercising discretion to discount or ignore an unsound Guideline, a judge contributes to an on-going, self-corrective mechanism. A Guideline does not represent embedded and permanent wisdom about any given category of sentences. Rather, Congress and the Commission "foresee continuous evolution helped by the sentencing courts . . . [who], applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence)." *Rita*, 127 S. Ct. at 2464. Sentencing "judges will set forth their reasons . . . [and] the Commission will collect and examine the results." *Id.* Thus, "the sentencing judge's explanation[s] should help the Guidelines constructively evolve over time, as both Congress and

the Commission foresaw." *Id.* at 2469; *see also id.* at 2483 (Scalia, J., concurring) (stating that as "district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range . . . the Sentencing Commission [can] perform its function of revising the Guidelines to reflect desirable sentencing practices of the district courts"). The evolution of the Guidelines is all the more important where, as here, the applicable Guideline is unmoored from any empirical evidence or historical sentencing practice.

In initially crafting the Guideline for any given offense, the Commission contended with the reality that "the goals of *uniformity* and *proportionality* often conflict." *Rita*, 127 S. Ct. at 2464 (emphasis in original). The Commission's "sometimes controversial effort," *id.* at 2463, was fraught with "the difficulties involved in developing a practical sentencing system that sensibly reconciles the two ends," *id.* at 2464. In the case of crack sentencing, the goal of uniformity trumped proportionality: Crack sentences march to a rigid, quantity-driven calculus, yielding sentences that are vastly disproportionate to other similarly culpable or harmful conduct.

District courts, in declining to follow the crack Guideline, need not undertake a full-scale evaluation of all that is flawed in this particular Guideline. Rather, the sentencing judge must demonstrate that "he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 2468 (citing *United States v. Taylor*, 487 U.S. 326, 336-37 (1988)). The level of detail in this statement of reasons "depends upon circumstances" and "leaves much . . . to the judge's own professional judgment." *Id.* The sentencing court below, in finding the crack

Guideline unsound, acted against the backdrop of an ample, even robust, body of analysis; the judge (and the parties) were under no obligation to unearth new, original reasons. But, even when a critique is new or emerging, a judge must consider it when raised by the parties, and has broad discretion to reject a Guideline generally when that rejection is supported by reasoned analysis.

Sentencing courts have developed at least three ways of correcting for an unsound Guideline—all of them permissible in rendering appropriate sentences because they are anchored in the factors that Congress has instructed district courts to consider when imposing an appropriate sentence. First, the sentencing judge might assign a generically unsound Guideline no weight at all in any case involving that Guideline, and then proceed to apply the other factors under § 3553(a). Those other factors call on the district court to make the same judgments the Commission rendered in constructing the Guideline in the first place. *Id.* at 2463. If the district court deems a particular Guideline fundamentally unsound because it does not effectuate the purposes of sentencing pronounced in § 3553, then the court could reasonably conclude that the Guideline serves no purpose whatsoever as a starting point for calculating some lesser sentence.

Second, a sentencing judge might conclude that a Guideline is categorically (though perhaps not entirely) unsound, and then make a judgment about the degree of usefulness for that Guideline. Many district courts have adopted this approach in crack cases, typically with a judge substituting a ratio different from the 100:1 ratio utilized by the Sentencing Commission in comparing quantities of crack and powder cocaine that trigger identical

Guideline outcomes. *See, e.g.*, *Fisher*, 451 F. Supp. 2d at 562 ("I conclude that a 10:1 ratio is sufficient to punish crack cocaine dealers more harshly than those who deal in powder cocaine."); *Leroy*, 373 F. Supp. 2d at 892 ("I concluded that the 100:1 ratio did not produce a sentence consistent with the § 3553(a) factors, and that the 20:1 ratio last proposed by the Commission was reasonable."). While this approach generally has been rejected by the courts of appeals, *see* n.6, *supra*, the use of alternative ratios follows from a district court's authority to evaluate the soundness of a Guideline judgment and to fashion a sentence that is not "greater than necessary" to effectuate the purposes of sentencing. 18 U.S.C. § 3553(a). If, for example, the sentencing court believes that the 100:1 ratio does not—tracking a factor the court must consider—"reflect the seriousness of the offense," 18 U.S.C. § 3553(a)(2), but does believe that a 20:1 ratio would carry out this purpose of sentencing, then the court should be able to follow this Congressional directive and impose a sentence that takes that alternative ratio as a starting point for considering the offender-specific aspects of § 3553(a).

Third, the sentencing court might adopt a more limited position that a Guideline is flawed only insofar as it applies to the particular offender before the court. This approach appears to be the one endorsed in *Gunter* and *Pickett*, as well as potentially in *Jointer*, which held that a district court may consider the problems with the crack Guideline, but that such concerns must be "refracted through an individual defendant's case." 457 F.3d at 687-88. Sentencing courts must, at a minimum, be able to consider whether flaws in the crack Guideline make it unsound for the particular offender on whom the sentence will be imposed, even if leaving open the

possibility that the Guideline might be sound for some other crack offender. *See, e.g.*, *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) ("[T]he crack guideline was a poor fit given the specific circumstances of this case."). The Guideline could be unsound in an individual's case where, for instance, the offender does not fit the mine-run offender that the Sentencing Commission envisioned—high-level and/or violent dealers of crack—when crafting the Guideline.

In *Rita*, this Court approved of a sentencing judge accepting the "Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case," and then imposing a Guideline sentence when the judge finds "that the case before him is typical." 127 S. Ct. at 2468. In *Rita* the parties did not argue that the perjury Guideline was inappropriate for the typical perjury offender, and the district court concluded that Mr. Rita was a typical offender. Crack sentencing, by contrast, turns this calculus on its head: Numerous judges have found that the crack Guideline fails to produce a proper sentence in the typical case *and* many offenders, like Mr. Kimbrough, are not typical offenders, in the sense that they bear little resemblance to the kind of offender anticipated by the Commission when it first formulated the crack Guideline. Mr. Kimbrough may be typical of the people actually prosecuted for crack offenses, but he (and his many contemporaries now in federal prison on crack charges) are far from the anticipated mine run of violent, kingpin distributors.

CONCLUSION

For the reasons stated herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 3553(a) must be construed to require that the sentencing court both consider the guideline offense level and independently evaluate the nature, circumstances, and seriousness of the offense, even if this leads to disagreement with Sentencing Commission determinations such as the 100:1 crack/powder cocaine ratio.

2. Whether 18 U.S.C. § 3553(a)(6)'s requirement that the court consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct must be construed to permit the sentencing court to disagree with guideline offense levels in a given case.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, save the one representing the Petitioner in this matter and in No. 06-7949, *Gall v. United States*. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts, and we represent thousands of individuals who are sentenced each year. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their attorneys and other staff. The issues presented in this case are of great importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

The district court properly evaluated and sentenced this case under 18 U.S.C. § 3553, and the Fourth Circuit was wrong to vacate and remand the resulting sentence. After hearing argument, the district court explained, consistent with § 3553(a)'s requirements, that the sentence was to be imposed in order to "reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, and to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in

[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

the most effective way." Joint App. at 72. The court then stressed that a sentence should not be imposed that "was greater than necessary" to achieve those objectives. *Id.* Having properly described the law, the district court then ruled that to "impose a sentence of 19-22 years in this case [would be] ridiculous. It imposes more punishment, given the record . . . than is necessary to accomplish what needs to be done." *Id.* The resulting sentence was reversed by the Fourth Circuit because it did not adhere strictly to guideline § 2D1.1's 100:1 ratio between powder cocaine and crack cocaine.

The district court properly read, independently and in the disjunctive, those parts of § 3553(a) that required it to consider the nature and circumstances of the offense (§ 3553(a)(1)), the seriousness of the offense (§ 3553(a)(2)(A)), the guidelines (§ 3553(4)), and the need to avoid unwarranted disparities (§ 3553(a)(6)). In vacating this sentence, the court of appeals conflated these independent considerations. By requiring the judge to follow the 100:1 ratio between powder cocaine and crack cocaine, the court of appeals robbed § 3553(a)(1) & (2)(A) of meaning independent of the guidelines' assessment of the nature, circumstances, and seriousness of the offense, which is expressed through the 100:1 ratio and already accounted for in 18 U.S.C. § 3553(a)(4). Similarly, by conflating the need to avoid unwarranted disparities with the uniformity supposedly created by the 100:1 ratio, the court of appeals drained 18 U.S.C. § 3553(a)(6) of any independent meaning.

Unlike the court of appeals, the district court gave meaning to the Parsimony Clause of 18 U.S.C. § 3553(a), which requires that a sentence be "sufficient, but not greater than necessary" to comply with the goals of § 3553(a)(2). While the court of appeals ignored the Parsimony Clause in

mandating strict adherence to the 100:1 ratio, the sentencing judge properly employed it to order and weigh relative to one another the § 3553 factors as they applied to Petitioner so as to "impose a sentence sufficient, but not greater than necessary . . . ."

The Fourth Circuit Court of Appeals, like many of its sister circuits, mandates strict adherence to the 100:1 ratio in part because of its view that a break from this ratio would constitute an "unwarranted disparity." This reflects an improper reading of the portion of the statute which directs the avoidance of unwarranted disparities, 18 U.S.C. § 3553(a)(6). That statute does not require the imposition of the 100:1 ratio; rather, it supports giving similar sentences to those with similar records found guilty of similar conduct. Here, the sentencing judge determined that crimes relating to cocaine, whether in crack or powder form, were relatively similar. This is certainly a reasonable view, particularly given the support for that idea from the Sentencing Commission itself. Thus, it was neither unwarranted nor did it create a disparity.

ARGUMENT

I. To Give Meaning To All the Provisions of 18 U.S.C. § 3553(a), District Courts Must Be Permitted to Disagree with the 100:1 Ratio Between Amounts of Powder and Crack Cocaine.

At the heart of this case is the district court's decision to reject the 100:1 powder/crack cocaine ratio found in sentencing guideline § 2D1.1(c), saying it was "clearly inappropriate and greater than necessary to accomplish

what the statute says you should in fact accomplish in this case." Joint App. at 74. The district court, in independently reviewing the case and ultimately rejecting the 100:1 ratio, was following the directives of 18 U.S.C. § 3553(a), if that statute is read to avoid redundancies. In this way, the district court was complying with, not ignoring, the properly expressed will of the legislature.

Amici agree, for the reasons set out in Petitioner's principal brief, that the Fourth Circuit's decision to vacate the sentence is erroneous. They submit this brief to suggest the application of well-established principles of statutory construction in the interpretation of 18 U.S.C. § 3553(a). Effect should be given to the plain language of every provision of a statute, and application of this principle to § 3553(a) clearly requires the sentencing court both to consider the Sentencing Commission's evaluation of an offense as reflected in the guidelines, and to make its own independent evaluation of the nature, circumstances, and seriousness of an offense. In this case, that proper and independent consideration led to a sentence outside the guideline range dictated by the 100:1 ratio once those factors were balanced relative to one another according to the Parsimony Clause.

A. To Avoid Redundancy, a Sentencing Judge Must Consider the Nature, Characteristics, and Seriousness of the Offense Independent of Guideline Elements Such as the 100:1 Ratio.

There are two separate and distinct portions of 18 U.S.C. § 3553(a) that address the seriousness of a given type of offense, such as trafficking in crack cocaine. One of these is the guideline range itself; § 3553(a)(4) expressly

requires consideration of the guideline range found to apply. As this Court held in *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007), the guideline range (through the offense level score) reflects and incorporates the Sentencing Commission's view of the § 3553(a) factors. This is especially true as to the seriousness of the offense, since the Commission's evaluation of that factor necessarily plays a large role in the Commission's job of creating relative offense levels for various types of crime. *See* 28 U.S.C. § 994(c) (requiring Commission to consider gravity of the offense in promulgating offense categories). Accordingly, the district court was required to consider the Commission's apparent judgment, expressed through the 100:1 ratio, that one crime (dealing crack) is much more serious than another (dealing powder cocaine).

However, there is another, distinct part of the controlling statute that specifically and separately directs the sentencing court itself to consider "the need for the sentence imposed to reflect the seriousness of the offense . . . ." 18 U.S.C. § 3553(a)(2)(A). Unlike § 3553(a)(4), this directive does not refer to the guidelines; it stands on its own. Thus, there are two distinct mandates in 18 U.S.C. § 3553(a) that the sentencing judge consider "seriousness of the offense" – once via the offense level score provided by the guidelines, and again in independently determining the sentence to impose.

The Fourth Circuit would conflate these two independent clauses. It effectively defines the meaning of 18 U.S.C. § 3553(a)(2)(A) as an evaluation of seriousness of the offense that is limited to the guideline score already considered under 18 U.S.C. § 3553(a)(4). Affirming the Fourth Circuit would mean that the district court's consideration under (a)(4) of the seriousness of crack offenses (as

included in the guidelines through the 100:1 ratio) also fulfills the distinct mandate of (a)(2)(A). By this reading, a district court has no ability to evaluate the seriousness of the offense because the guidelines have already done so conclusively, leaving no factor-weighing role for the district court.

The problem with the Fourth Circuit's view is that it renders 18 U.S.C. § 3553(a) redundant, since both § 3553(a)(2)(A) and § 3553(a)(4) would direct the sentencing judge to the same expression of seriousness of the offense contained in the guidelines through the 100:1 ratio. Two parts of the statute would mean the same thing.

Such a construction is plainly improper. Reading the language of 18 U.S.C. § 3553(a)(2)(A) as redundant, rather than reading it to require an independent evaluation of the seriousness of that type of offense by the sentencing court, runs contrary to this Court's direction that statutes should not be construed in a way that renders one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). As this Court has recognized, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Indeed, Congress is presumed to have given each word in a statute specific and important meaning. *Id.* The words of an express act of Congress should not be rendered meaningless by the interpretation the Fourth Circuit has provided.

The same logic applies to § 3553(a)(1)'s directive that the sentencing court consider the "nature and circumstances" of the offense. The guidelines, with their complex multi-factor lists of aggravating circumstances, should not

prevent the sentencing court from properly giving independent meaning to (a)(1)'s directive that it also analyze those circumstances. Similarly, the nature of the offense cannot be defined solely by the guidelines; because a district court is not simply allowed, but required to consider independently the nature of the offense, that court must be permitted to disagree with conclusions of the guidelines, so long as it considers them.

If all of § 3553(a) is to be given effect, then § 3553(a)(1) & (a)(2)(A)'s directive that a judge consider the nature, circumstances and seriousness of the offense cannot mean that the district court merely looks to the guidelines. Rather, a proper reading of the statute insists that the judge must *independently* evaluate the nature, circumstances and seriousness of that type of offense in addition to considering the determination reflected in the guideline score. In the context of a crack cocaine case, that means the sentencing judge must independently evaluate the use of the mechanism through which the guidelines describe the seriousness of crack cocaine offenses – the 100:1 ratio.[2]

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[2] The same logic extends to 18 U.S.C. § 3553(a)(6), which directs the sentencing judge to consider whether a sentence gives rise to an unwarranted disparity. The (a)(6) requirement must mean something different than simply following the guidelines, as that is already accounted for within the statute. The proper role for the requirement of 18 U.S.C. § 3553(a)(6) that a judge consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" is fully explored in Part II of this brief.

B. The Sentencing Court's Consideration of the Seriousness of the Offense Is Not Restricted to the Particularized Circumstances of the Case Before It.

One response to the argument set out above might be to claim that there is no redundancy because 18 U.S.C. §§ 3553(a)(2)(A) and (a)(4) have separate functions. By this view, 18 U.S.C. § 3553(a)(4) establishes the seriousness of a *type* of offense (for example, through the 100:1 ratio contained in the guidelines for crack cocaine), while § 3553(a)(2)(A) separately directs the court to consider the seriousness of a *particular* defendant's crime, allowing for consideration of individualized circumstances that do not necessarily apply to the entire category of cases of that type.

This construction of the statute avoids one redundancy by creating another. There are two basic types of individualized circumstances: those relating to the individual defendant as a person (such as an impressive history of service to the community), and those that relate to the offense itself (such as particularly cruel conduct). Both of these types of individualized circumstance are already accounted for in § 3553(a)(1), which requires that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . circumstances of the offense and the history and characteristics of the defendant." Thus, both types of individualized circumstances already must be considered by the sentencing court before even reaching the mandate that seriousness of the offense be considered. To avoid making its language inoperative, 18 U.S.C. § 3553(a)(2)(A)'s directive to consider seriousness of

the offense must mean something other than the individualized circumstances of the case.[3]

In the end, if all of § 3553(a) is to be given effect, it is inescapable that 18 U.S.C. § 3553(a)(2)(A) affirmatively directs a sentencing court to independently evaluate the seriousness of the offense, which may mean disagreeing with the Commission's evaluation of seriousness described by and through the 100:1 ratio. That is exactly what the district court did below, and it was justified in doing so by Congress' statutory mandates in 18 U.S.C. § 3553(a).

C. This Court's Opinion in *Rita* Supports Independent Evaluation of the 100:1 Ratio By a Sentencing Judge.

Allowing evaluation of the seriousness of an offense, independent of guideline determinations such as the 100:1 ratio, finds support not only in the language of 18 U.S.C.

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[3] In addition to rendering either § 3553(a)(1) or § 3553(a)(2)(A) superfluous, this "separate function" analysis mistakes the nature of the guidelines themselves. In addition to a base offense level for each type of crime, the offense guidelines in Chapter Two of the *Guidelines Manual* ordinarily include numerous specific adjustments fashioned for application on the individual facts of a particular defendant's case. For example, guideline § 2D1.1, in addition to setting the base offense level for crack offenses using the 100:1 ratio, also includes adjustments for such things as death or bodily injury (§ 2D1.1(a)(1), (a)(2)); use of a weapon (§ 2D1.1(b)(1)) or private aircraft (§ 2D1.1(b)(2)); distribution in prison (§ 2D1.1(b)(4)); and the discharge or transportation of hazardous wastes (§ 2D1.1(b)(8)(A)). These sorts of adjustments do not reflect the *type* of offense, but instead the Sentencing Commission's consideration of individual characteristics. Congress expressly contemplated that the guidelines would take such particularized facts into account; § 994(c) requires the Commission to consider "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense." 28 U.S.C. § 994(c)(1).

§ 3553(a), but also in the language of this Court's decision in *Rita*.

The majority opinion in *Rita* made it clear that the imperatives of 18 U.S.C. § 3553(a)(2)(A) apply to both the Sentencing Commission and to sentencing judges. 127 S. Ct. at 2463. The Sentencing Commission first looks to those imperatives to create offense level factors such as the 100:1 ratio, and then district courts subsequently and independently look at both those same purposes and the Commission's conclusion (via the guidelines) before imposing a sentence. *Rita* found it fair to assume that the guidelines, so far as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives. *Id.* at 2465. As Justice Breyer described it in *Rita*, the Commission deals with these objectives at "wholesale," while the District court does so at "retail." *Id.* at 2463.[4]

Rita's approach to 18 U.S.C. § 3553(a) avoids rendering any part of the statute superfluous by reading § 3553(a)(2)(A) to require a judge to independently evaluate the seriousness of offenses by category, not just in light

[4] Justice Breyer's wholesale/retail analogy fits the argument advanced here, too. After all, wholesalers suggest a price (the "Manufacturer's Suggested Retail Price") which retailers then will take into consideration as they set their own prices, just as sentencing judges must consider the "price" described by the guidelines. That is not the end of the story, though, or prices would be uniform for any given good. Instead, retailers will subsequently and independently set a price for a category of items that takes into account their own observations about the market, which may or may not agree with those of the wholesaler. There may at times be uniformity at wholesale (since there is only one seller), but rarely at retail will the same level of uniformity exist. Nor should it: It is the job of each retailer to determine what price the market will bear for a certain good. Sentencing judges, in performing their analogous function, must make a similar independent evaluation.

of individualized circumstances. It reflects an understanding that the Commission should seek to incorporate § 3553(a)(2)(A) in creating guideline ranges, meaning that when a guideline case reaches the sentencing judge those purposes must be freshly considered, even though broad policy concerns are involved, because to do otherwise would render parts of the statute superfluous.

The majority opinion in *Rita* did more than affirm the sentencing judge's authority to independently evaluate categories of offenses; it also made clear that the judge was free to disagree with the guidelines:

> [The sentencing judge] may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, *perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations*, or perhaps because the case warrants a different sentence regardless.

127 S. Ct. at 2465 (emphasis added); *see also id.* at 2468 (a party may contest the sentence by arguing "that the guidelines reflect an unsound judgment"). Thus, this Court has already concluded that it is proper to argue exactly the point made by the defense and adopted by the district court below – that a guideline (such as § 2D1.1(c) with its 100:1 powder/crack ratio) fails generally to properly reflect the seriousness of the type of offense at issue.

D. In Applying 18 U.S.C. § 3553(a), the Parsimony Clause Should Serve as a Guide to the Weighing of the Relative Importance of Sentencing Factors.

In ruling that the 100:1 ratio must be strictly followed, the Fourth Circuit implicitly suggested that the factors in 18 U.S.C. § 3553(a) have a hierarchy – that at least sometimes, such as in crack cases, the guidelines trump the other factors. After the excision of § 3553(b) in *United States v. Booker*, 543 U.S. 220 (2005), nothing in the statute itself substantiates this claim. In fact, the statute refutes it.

The statute is clear on two important points. First, the sentencing judge must consider each of the § 3553(a) factors. Second, the sorting mechanism to be employed in weighting those factors is the Parsimony Clause of § 3553(a), which insists that the sentencing judge "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Importantly, the directive to consider the seriousness of the offense is contained in that paragraph (2).

In reversing Petitioner's sentence, the Fourth Circuit effectively held that the 100:1 ratio must be employed, even if it results in a sentence the district court believed was greater than necessary to achieve the goals of sentencing. This ruling establishes a weighting of the § 3553(a) factors that flies in the face of the proper sorting mechanism, as there is nothing in the broad application of the harsh 100:1 ratio which achieves the goals of the Parsimony Clause. Blanket application of the 100:1 ratio guarantees that the sentence will sometimes be (in the view of the sentencing judge) greater than necessary to comply with the purposes set out in 18 U.S.C. § 3553(a)(2).

This Court should clearly state the proper role of the Parsimony Clause: To order the relative importance of the § 3553(a) factors so that the resulting sentence is not overly severe. In a case such as this one, the district court must be allowed to determine that giving conclusive weight to the 100:1 ratio will not fulfill the requirements of parsimony, particularly where a sentencing judge's view of a § 3553(a)(2) factor such as seriousness of the offense weighs against employment of the 100:1 ratio.

II. 18 U.S.C. § 3553(a)(6) Does Not Require Deference to Policies Embodied in the Guidelines, but, Rather, Authorizes an Independent Judicial Inquiry Into Whether Any Contemplated Sentence Would Give Rise to an Unwarranted Disparity.

At the same time that it failed to give effect to the provisions of 18 U.S.C. § 3553(a)(1), (a)(2), and (a)(4), the Fourth Circuit also based its decision in this case on an incorrect interpretation of 18 U.S.C. § 3553(a)(6). In holding that a "sentence that is outside the guidelines range is *per se* unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses," the Fourth Circuit relied on its earlier decision in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed*, No. 05-11659 (U.S. June 20, 2006). Joint App. at 98. *Eura*, in turn, rested on the court's belief that "giving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity between similarly situated defendants in direct contradiction to the specific mandate of 18 U.S.C. § 3553(a)(6)." 440 F.3d at 633 (citations omitted). The interpretation of (a)(6) embodied

in this statement reflects two erroneous assumptions: that a sentencing court's modification of the guidelines' 100:1 ratio necessarily produces an "unwarranted disparity" within the meaning of (a)(6), and that (a)(6) may trump the sentencing court's weighing of (a)(2) factors under the Parsimony Clause. Neither assumption is supportable.

A. A Sentencing Court's Rejection of a Guidelines Policy Does Not *Per Se* Constitute an Unwarranted Disparity Under 18 U.S.C. § 3553(a)(6).

By its own terms, § 3553(a)(6) is not addressed to guidelines compliance, but to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Here, "unwarranted sentence disparities" has a specific meaning, referring exclusively to disparities "among defendants with similar records who have been found guilty of similar conduct." The text thus addresses a more precise concern than does the Fourth Circuit's loose rendering of (a)(6) as a mandate "to bring about increased uniformity in the sentencing of similarly situated defendants." *See Eura*, 440 F.3d at 633. What makes defendants similarly situated under (a)(6)? The text provides a clear answer: They must have similar records, and they must have been found guilty of similar conduct. Any form of disparity other than disparity among defendants with similar records who have been found guilty of similar conduct thus lies beyond the purview of (a)(6). Because sentences outside of the guidelines – whether or not based on a policy disagreement – may or may not give rise to the relevant form of disparity, it is incorrect to assume, without further analysis, that imposing a non-guidelines

sentence is "in direct contradiction to the specific mandate of 18 U.S.C. § 3553(a)(6)." *See Eura*, 440 F.3d at 633. Instead, it is crucial for the sentencing court first to identify the set of defendants who "have been found guilty of similar conduct." Indeed, once this analysis is undertaken, it may become apparent that a *guidelines* sentence would produce just the sort of disparity that is discouraged by (a)(6).

1. A Non-Guidelines Sentence Is Not *Per Se* A Disparate Sentence Under 18 U.S.C. § 3553(a)(6).

In enacting the Sentencing Reform Act (SRA), Congress established separate mandates for the sentencing court to consider both the guidelines and the need to avoid unwarranted disparities. *Compare* 18 U.S.C. § 3553(a)(4), *with* 18 U.S.C. § 3553(a)(6). At the same time that Congress enacted (a)(4) and (a)(6), Congress also directed the Sentencing Commission to draft sentencing guidelines that might – indeed, to some extent, were required to – take into account a multitude of factors going beyond merely the defendant's record and the conduct for which he was found guilty. *See, e.g.*, 28 U.S.C. § 994(c) (authorizing Commission to take into account, *inter alia*, "nature and degree of harm caused by the offense," "public concern generated by the offense," and "the deterrent effect of a particular sentence"); § 994(d) (authorizing Commission to take into account a variety of offender characteristics in addition to criminal history); § 994(n) (requiring Commission to assure that "the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an

offense"). Indeed, as demonstrated by both the text and legislative history of the SRA, Congress expected that the guidelines would reflect a form of "real-offense sentencing" – that is, that the guidelines would take into account a variety of offense characteristics in addition to the specific conduct of which the defendant was found guilty. *See, e.g.*, 28 U.S.C. § 994(c)(2) (authorizing Commission to take into account "circumstances under which the offense was committed"); S. Rep. No. 98-225, at 168, *reprinted in* 1984 U.S.C.C.A.N. 3182 ("There would be expected to be . . . several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances."). And real-offense sentencing is what the Commission delivered, going so far as to permit consideration of acquitted conduct. *See United States v. Watts*, 519 U.S. 148 (1997).

In this context, § 3553(a)(6) becomes a reminder to the sentencing court – notwithstanding the complex array of factors made relevant by the guidelines – that two particular factors merit special consideration: the defendant's record and the conduct of which the defendant has been found guilty. Viewed this way, (a)(4) and (a)(6) are not redundant, but complementary, requiring the sentencing court to balance the sometimes competing goals of, on the one hand, adhering to a complex guidelines system designed to account for collateral conduct and further a multitude of purposes, and, on the other hand, also achieving some measure of uniformity based on just two factors of particular importance (record and the conduct of which the defendant has been found guilty).[5]

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[5] A contrary interpretation of (a)(6), in which the provision was viewed as simply requiring or encouraging the selection of a guidelines sentence, would, of course, run afoul of the principle that statutes

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The legislative history supports both the specific definition of disparity apparent in the text and the concerns about real-offense sentencing implicit in that definition. In the words of the Senate Judiciary Committee Report, the SRA "establishes *two factors* – the prior records of offenders and the criminal conduct for which they are to be sentenced – as the *principal determinants* of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity." S. Rep. No. 98-225, at 161 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 (emphasis added).[6] Meanwhile,

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should not be interpreted so as to render any provision superfluous. *See supra* Part I.A. Moreover, depending on how much additional weight the guidelines were given, such an interpretation of the statute might also run afoul of the principle that interpretations creating constitutional problems should be avoided. *Cf. Rita*, 127 S. Ct. at 2477-78 (Scalia, J., concurring in part and concurring in the judgment) (arguing for interpretation of SRA excluding substantive reasonableness review in light of constitutional problems). Nor would the redundancy and avoidance problems necessarily be cured by interpreting (a)(6) only to require compliance with the *policies* embodied in the guidelines, rather than compliance with the guidelines ranges, thereby theoretically permitting a non-guidelines sentence on the basis of case-specific sentencing factors not covered by guidelines policies. Not only does the distinction lack any apparent basis in the text of (a)(6), but the domain of "policy" is potentially so expansive as to leave little more room for judicial discretion than in the pre-*Booker* regime. There are, in fact, few recurring sentencing factors of any real significance that are not at least arguably covered by one of the guidelines or the Commission's associated policy statements. Even many of the most important offender characteristics, although receiving far less detailed treatment than offense characteristics, are expressly addressed in Part 5H of the guidelines (if only to be categorized as not, or not ordinarily, relevant).

[6] If there is any doubt about the limited scope of the term "criminal conduct for which they are to be sentenced," the Committee Report also uses the term "convicted of similar offenses" in its discussion of disparity, *id.*, which even more clearly indicates a rejection of real-offense factors in determining whether a disparity exists. For a more complete review of the relevant legislative history, showing that the

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concerns over the potential extremes to which real-offense sentencing might go were voiced in particularly strong form by the House Judiciary Committee Report. H.R. Rep. No. 98-1017, at 98 (1984) ("The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit 'real offense' sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties.").[7]

Given that the determination of a guidelines sentence is based on a much broader set of factors than is the determination of disparity under § 3553(a)(6), there is no reason to assume that a guidelines sentence necessarily avoids disparity, or that a non-guidelines sentence gives rise to disparity.

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term disparity contemplated a comparison of the offenses of conviction, *see* Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. 3553(a)(6) After* Booker, 37 McGEORGE L. REV. 627, 641-43 (2006).

[7] To be sure, the final version of the SRA more closely resembles the Senate bill than the House bill. *See* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 745 (1999). This does not mean, however, that the views of the House Committee should be regarded as irrelevant. Indeed, based on the last-minute addition of the Parsimony Clause to the Senate bill, there is good evidence that the Senate intended, through § 3553(a), to accommodate, rather than simply reject, the House's concerns regarding the guidelines. *See id.* at 746-47.

2. Section 3553(a)(6) Requires an Independent Judicial Inquiry Into Whether Any Contemplated Sentence Would Give Rise to an Unwarranted Disparity.

By its plain terms, § 3553(a)(6) calls for a two-step analytical process: First, the sentencing court must determine whether a contemplated sentence would give rise to a disparity; and second, the court must determine whether the disparity is warranted. In the first step, as discussed above, the sentencing court should identify as a basis for comparison the group of other defendants "with similar records who have been found guilty of similar conduct." The use of the term "similar conduct," as opposed to "same conduct," indicates that the court may consider a broader group of defendants than those who have been convicted of a crime identical to that of the defendant being sentenced. Neither the statute nor the legislative history clearly indicates what makes criminal conduct "similar," implicitly leaving the matter for the sentencing court to resolve in light of the broad purposes of the SRA.

Thus, in a crack cocaine distribution case, a sentencing court might appropriately identify *all* cocaine defendants distributing comparable quantities (whether in powder or crack form) as the appropriate comparison group. After all, as the Sentencing Commission itself has made clear, defendants convicted of crack offenses have engaged in criminal conduct that is "similar" to those convicted of powder offenses, in light of the recognized purposes of sentencing. *See, e.g.*, United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 62 (2007) (hereinafter 2007 Report) ("Crack cocaine and powder cocaine are both powerful

stimulants, and both forms of cocaine cause identical effects.").

Upon finding a disparity in the guidelines' treatment of, say, cocaine offenders, the sentencing court would next have to decide whether imposing a guidelines sentence incorporating the disparity would be "unwarranted." As with "similar conduct," the statute does not define "unwarranted," leaving it to the sentencing court to decide, consistent with the general purposes of the SRA, which disparities are of concern. In a crack case, for instance, a sentencing court might appropriately determine that, in light of the similar seriousness of crack and powder offenses, the 100:1 ratio represents unwarranted disparity.[8] *See* 2007 Report at 8 ("The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine . . . [T]he 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.")

When the sentencing court has determined both that a contemplated sentence would give rise to a disparity and that the disparity would be unwarranted, the court must then, in the words of the statute, "consider . . . the need to avoid" such a disparity. This is not a statutory mandate to *eliminate* the disparity, but rather to give attention to the disparity right along with the remaining sentencing factors under 18 U.S.C. § 3553(a). The implication is that the sentencing court should strike a balance, seeking to

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[8] The court might also take into account the disparate racial impact of the 100:1 ratio, *see* 2007 Report at 8, in light of the SRA's particular concern with *racial* disparities. *See, e.g.*, 28 U.S.C. § 994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race . . . of offenders.").

mitigate serious unwarranted disparities in ways that do not unduly compromise competing objectives embodied elsewhere in § 3553(a).[9] Sometimes, the balance will point towards a guideline sentence; other times, it will point towards a sentence outside the range.

While this approach to § 3553(a)(6) may be more demanding than merely placing a thumb on the scales in favor of the guidelines sentence, (the approach suggested by the reasoning in *Eura*), it need not be especially burdensome to sentencing courts. As this Court explained in *Rita*, a sentencing judge need only "set forth enough to satisfy the appellate court that he has . . . a reasoned basis for exercising his own legal decisionmaking authority." 127 S. Ct. at 2468. If the considerations of (a)(6) and the other factors in § 3553(a) lead a judge to decide "simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation." *Id.* And when these considerations lead the judge to impose a sentence outside the guidelines, he need merely "explain why he has done so." *Id.* In the instant case, for example, the district court expressly considered the § 3553(a) factors, applied them to Petitioner and his offenses, and determined the punishment "necessary to accomplish" the goals of federal sentencing. Joint App. at 72. Such a statement,

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[9] In deciding how much weight to give to (a)(6), it may be appropriate to consider whether mitigating a disparity relative to one group of similarly situated defendants (e.g., the total set of cocaine defendants) would aggravate a disparity relative to a different set of similarly situated defendants (e.g., crack defendants). Where there are competing unwarranted disparities, the weight given to (a)(6) might be minimized, or the court might seek to find a middle ground that avoids extreme disparities relative to either group.

while brief, was legally sufficient. *Cf. Rita*, 127 S. Ct. at 2469.[10]

Nor does the (a)(6) analysis, though discretionary, render the guidelines meaningless or promote wild variation in sentencing practices. Even when application of the guidelines cause disparities within the meaning of (a)(6), sentencing courts may often find the disparities to be "warranted." And in those cases where tensions are found between (a)(4) and (a)(6), nothing in the statute indicates that (a)(6) must necessarily be given more weight. Finally, the discretion contemplated by (a)(6) is limited in direction and magnitude, authorizing only the mitigation of unwarranted sentencing disparities. Thus, a sentencing court finding that the 100:1 ratio gives rise to unwarranted disparity might properly invoke (a)(6) as a basis for some reduction in a crack sentence, but not a basis for either a sentence increase or a sentence reduction that goes below the norm for defendants "with similar records who have been found guilty of similar conduct."[11]

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[10] As the Court noted in *Rita*, where nonfrivolous reasons are provided, but not accepted, "Sometimes the circumstances will call for a brief explanation [of the sentencing court's decision]; sometimes they will call for a lengthier explanation." 127 S. Ct. at 2468. Appellate review will then involve "merely ask[ing] whether the trial court abused its discretion." *Id.* at 2456 (quoting *Booker*). Although *Rita* did not deal with an argument for a non-guidelines sentence based specifically on (a)(6), there is no apparent reason why the general standards articulated in *Rita* would not apply in the present context.

[11] This is not to say such sentences are impermissible, merely that (a)(6) does not provide support for them.

B. The Mandate of 18 U.S.C. § 3553(a)(6) Is Subordinate to the Parsimony Clause.

In any given case, whether (a)(6) lends greater support to a sentence inside or outside the guidelines range, the statute makes clear that (a)(6) is not some sort of a trump card that dominates all other factors. Rather, as demonstrated in Part I above, all of the § 3553(a) factors should be considered and weighed relative to one another according to the Parsimony Clause of 18 U.S.C. § 3553(a). Where (a)(6) is merely something that the sentencing court "shall consider," the statute mandates that the court "shall impose" a sentence that satisfies the requirements of parsimony. Thus, while (a)(6) may be helpful and appropriate to weigh as a factor in selecting a sentence within the parameters of what is "sufficient, but not greater than necessary, to comply with the purposes [of (a)(2)]," (a)(6) cannot justify, let alone require, the imposition of a guidelines sentence that is (in the words of the sentencing court in this case) "clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish." Joint App. at 74.

The opinion of the Fourth Circuit seeks to mandate adherence to Congress' supposed will as expressed in the 100:1 ratio, but does not want to recognize the still-vibrant statutory directions of Congress that require avoiding the disparities inherent in the 100:1 ratio, giving meaning to parsimony, or mandating an independent judicial evaluation of the seriousness of a type of offense. The proper path is not to pick out of the statute one provision or another. Instead, courts should consider more than uniformity and the guidelines, and must give meaning to the whole statute if possible. Here, it is possible.

CONCLUSION

For all these reasons, together with those described in Petitioner's brief on the merits, the ruling of the Fourth Circuit should be reversed.

Respectfully submitted,

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DERRICK KIMBROUGH,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit organization formed to assist African Americans in securing their rights through litigation and other forms of advocacy. Its mission is to transform the promise of equality into reality for African Americans and, ultimately, all individuals, in areas such as education, political participation, economic justice and criminal justice. For many years, its attorneys have represented parties and LDF has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on the "War on Drugs" in particular. LDF has represented defendants in, *inter alia*: *United States v. Smith*, 229 F.3d 1145 (4th Cir. 2000) (per curiam) (unpublished table decision); *United States v. Smith*, No. 2:93CR00162-001 (E.D. Va. June 14, 2005) (granting Motion for Early Termination of Supervised Release); *People v. Worthy*, Index No. 3550/97 (Sup. Ct. N.Y. County, Sept. 16, 2005); *Williams v. State*, No. B-3340-9907-CR (Dist. Ct. Swisher County, Tex. June 16, 2003) (granting bail and immediate release from incarceration in case involving the arrests of 35 defendants in Tulia, Texas).[2] LDF also appeared as *amicus*

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[1] Pursuant to S. Ct. R. 37.6, *amicus* here affirms that no counsel for either party authored any part of this brief, and that no person or entity other than LDF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

[2] The defendants in Tulia, Texas were ultimately pardoned by Governor Rick Perry on August 22, 2003. *See* Release, Rick Perry, Office of the Governor, *Governor Perry Grants Pardons to 35 Tulia Defendants* (Aug. 22, 2003), available at http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2003-08-22.0734/view.

curiae in *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); *Banks v. Dretke*, 540 U.S. 668 (2004); and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), among others. LDF has observed the unfortunate effects of America's War on Drugs, including the mechanical application of the Federal Sentencing Guidelines, on African American communities, and believes its perspective would be helpful to the Court in resolving the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On four separate occasions, the United States Sentencing Commission ("Commission") has determined that the Sentencing Guidelines ("Guidelines") overstate the seriousness of crack cocaine offenses, fail to provide just punishment for such offenses, and, as a result, promote disrespect for the law. Specifically, the Commission found that the Guidelines' differentiation between crack and powder cocaine offenses lacks penological justification because crack cocaine is not more harmful or addictive than powder cocaine, does not cause more violent behavior than powder cocaine, and is not more likely than powder cocaine to coincide with or increase the likelihood of other crimes. The Commission also concluded that the Guidelines' crack/powder distinction has had a uniquely negative impact on the African American community. Specifically, the Commission found that African Americans are disproportionately subjected to the higher Guidelines sentences for crack cocaine offenses and that the high incarceration rate contributes to the devastating poverty and disenfranchisement disproportionately suffered by African Americans.

These serious questions about the legitimacy of the Guidelines' crack/powder sentencing disparity have increasingly led the African American community, the legal

community, and the public at large to view the criminal justice system with skepticism, resentment, and disrespect. They have also led the Commission repeatedly to recommend lowering the Guidelines range for crack offenses because, with such an adjustment, the crack sentences would better comply with the statutory purposes of punishment embodied in 18 U.S.C. § 3553(a).

In light of the Sentencing Commission's findings and recommendations, it is entirely reasonable for a sentencing judge to impose a below-Guidelines sentence for a crack offense if the sentencing judge determines that a Guidelines sentence fails to comport with the statutory purposes of the criminal law set forth in § 3553(a). The above described evidence of racial disparity and its concomitant harm is an appropriate consideration for that assessment because it is relevant to the district court's determination of what sentence length is "sufficient, but not greater than necessary . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," § 3553(a)(2)(A), "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), and "to protect the public from further crimes of the defendant," § 3553(a)(2)(C). As this Court recently observed, "when [a] judge's discretionary decision accords with the Commission's view of the appropriate application of §3553(a) . . . , it is probable that the sentence is reasonable." *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007).

Such a conclusion is also consistent with this Court's holdings in *United States v. Booker*, 543 U.S. 220 (2005), and *Rita*, 127 S. Ct. 2456, that the Guidelines are advisory, not mandatory; that there is no "presumption of unreasonableness" when a district court reaches a below-Guidelines sentence after considering the § 3553(a) factors, *id.* at 2467; and that judges are permitted to sentence below

the Guidelines range when that range reflects "unsound judgment," *id.* at 2468, fails to "generally treat certain defendant characteristics in the proper way," *id.*, or "fails properly to reflect § 3553(a) considerations," *id.* at 2465. A contrary holding -- that a district judge may not consider application of the crack Guidelines as excessive in individual sentencing decisions -- would render the crack Guidelines mandatory, and contradict the mandates of *Booker*, *Rita*, and the plain language of 18 U.S.C. § 3553(a).

ARGUMENT

I. THE RACIAL DISPARITIES PRODUCED BY APPLICATION OF THE CRACK COCAINE SENTENCING GUIDELINES PROMOTE DISRESPECT FOR THE LAW

A. The Crack Cocaine Sentencing Guidelines Have Resulted in Vast Racial Disparities.

The Anti-Drug Abuse Act of 1986 established a 100:1 ratio of powder cocaine to crack cocaine, 21 U.S.C. § 841(b)(1)(B), treating one gram of crack cocaine as the equivalent of one hundred grams of powder cocaine. The Sentencing Commission used the same 100:1 ratio in setting then-mandatory drug penalties in the initial Sentencing Guidelines that became law in November 1987. *See* U.S.S.G. § 2D1.1. Since the implementation of the Guidelines, African Americans have consistently and disproportionately suffered a panoply of direct and indirect harms.

There is no doubt, for example, that African Americans are incarcerated for federal crack-related offenses in vastly higher numbers and proportions than whites. In 1995, the Sentencing Commission reported to Congress that the federal government's 1991 "National Household Survey

on Drug Abuse" found that even though 52% of reported crack users were white, whites represented only 10.3% of federal convictions for simple crack possession.[3] U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 34, 152 (1995) ("1995 Report"). African Americans, on the other hand, represented 38% of crack users but 84.5% of federal convictions for simple crack possession. 1995 Report at 152. "[R]esearch on drug market patterns demonstrates that drug users generally purchase drugs from sellers of the same racial or ethnic background." The Sentencing Project, *Federal Crack Cocaine Sentencing* 4 (2007) (citing Dorothy Lockwood, Anne E. Pottieger, & James A. Inciardi, *Crack Use, Crime by Crack Users, and Ethnicity*, *in* ETHNICITY, RACE AND CRIME 21 (Darnell F. Hawkins ed., 1995)). The disparities are even more severe in the context of trafficking offenses, which form the bulk of the federal drug convictions.[4] Among those sentenced in federal court for crack trafficking offenses, over 88% were African American, whereas only 4.1% were white. 1995 Report at 152. These racial disparities continue to plague the system. *See, e.g.*, U.S. Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*, Table 34 (2003).

Moreover, the mechanical application of the 100:1 ratio through the Guidelines has also contributed to racial disparities in sentence length. In 1986, prior to the institution of the 100:1 ratio and the Guidelines, the average federal drug sentence for African Americans was 11% higher than

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[3] Simple possession refers to cases where the defendant is accused of possessing less than 5 grams of crack cocaine, an amount associated with personal use. Possession of 5 grams or more is presumed to be associated with trafficking in drugs.

[4] 96% of federal drug cases involve trafficking charges. *See* U.S. Sentencing Commission, 2006 Annual Report, at Figure 1 (2006), available at http://www.ussc.gov/ANNRPT/2006/figi.pdf.

for whites. Four years later, and after the institution of the Guidelines, the average federal drug sentence for African Americans was 49% higher. *See* Barbara Stone Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentence Imposed* 20 (1992). Between 1994 and 2003, the average time served by an African American for a drug-related offense increased by 77%, whereas the average sentence of white offenders increased only by 28%. Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 1994 (1998).[5] The Sentencing Commission, crediting a Bureau of Justice Statistics study covering the period from 1986 to 1990,[6] concluded that "[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants." 1995 Report at 154.

The results of these disparities for African Americans have been devastating. For the individuals unfairly sentenced, of course, the lengthy confinement is itself unconscionable. But by requiring lengthy prison terms for crack offenses, the Guidelines also subject countless African Americans to a host of consequences which far exceed the initial sentence:

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[5] Notably, "African Americans now serve virtually as much time in prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months)." The Sentencing Project, *Federal Crack Cocaine Sentencing*, at 4 (2007), available at http://www.sentencingproject.org/Admin/Documents/publications/dp_cracksentencing.pdf (citing Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, at 112 & Table 7.16 (2004)).

[6] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter?* (Nov. 1993), cited in the 1995 Report at 153.

Dilution of Voting Rights. Forty-six states and the District of Columbia deny incarcerated prisoners the right to vote. *See* Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* § II (1998), available at http://www.hrw.org/reports98/vote/usvot98o.htm#FELONY. In thirty-two states, convicted offenders may not vote while they are on parole, and twenty-nine of these states disenfranchise offenders on probation. *Id.* Only fifteen of these states disenfranchise all ex-felons, *id.*, thus sentence length is the critical factor that determines how long an individual remains disenfranchised. The Guidelines' exponentially longer crack cocaine sentences therefore contribute to the diminution of African American voting power by exacerbating the problem of African American felon disfranchisement.

Impaired Capacity for Re-Entry. Longer sentences also undermine even first-time offenders' capacity for successful community reintegration. Because, for example, prolonged incarceration frequently causes attenuated family and community relationships, the deterioration of a defendant's strong support network makes reintegration and reentry upon release more difficult. *See* James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective*, 3 CRIME POL'Y REP. 1, 17-19 (2001), available at http://www.urban.org/UploadedPDF/410213_reentry.PDF.

Other Harms to the Community. The lengthy prison terms associated with crack cocaine offenses also reach beyond individual families and contribute to the breakdown of community social structures like churches and schools that face a shortage of male

leaders. *See* Steven Rickman, *The Impact of the Prison System on the African Community*, 34 HOW. L.J. 524, 526 (1991); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002).

There is, in short, no doubt that the harms imposed on African Americans by the 100:1 ratio are disproportionate and severe.

B. The Racial Disparities Associated with the Crack Cocaine Sentencing Guidelines Have Caused Widespread Distrust of the Law.

The Guidelines' 100:1 sentencing disparity has engendered near universal criticism, causing widespread disrespect for the law and undermining the goals of the Sentencing Reform Act.

First and foremost, the U.S. Sentencing Commission itself has expressly disavowed the 100:1 ratio. Indeed, on four separate occasions, including in a report issued this year, the Commission has articulated its "consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act." U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at 7-8 (2007) ("2007 Report"); *see also* U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2002) ("2002 Report"); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 8 (1997) ("1997 Report"); 1995 Report (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006) (all reports available at http://www.ussc.gov/ reports.htm).

In reaching that conclusion, the Commission relied on not only the vast racial disparities described above, but also the lack of any penological justification for the 100:1 ratio. When the Guidelines were created in 1986, it was widely assumed that crack and powder cocaine were significantly different drugs. The 100:1 ratio was therefore designed to address the increased risks of harm and violence purportedly presented by crack cocaine as compared to powder cocaine. As the Commission has recognized, however, in the years since the development of these crack/powder Guidelines, extensive research has demonstrated that the critical supposed distinctions between these two drugs are in fact non-existent. It is now generally accepted that: (1) crack cocaine is not more instantly addictive than powder cocaine, *see* 2007 Report at B-19, 67; (2) crack cocaine does not engender a greater propensity for more violent behavior than powder cocaine, *see* 1995 Report at 184-87; and (3) crack cocaine use by expectant mothers does not carry greater risk of birth defects than powder cocaine use, *see* 2007 Report at 69; 1995 Report at 45; *see also* D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?*, 279 JAMA 1580 (1996) (finding that the psychological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack); Barry Zuckerman et al., *Overview of the Effects of Abuse and Drugs on Pregnancy and Offspring*, 149 NAT'L INST. ON DRUG ABUSE 16, 19 (1995).

Because it is now clear that crack cocaine poses no greater threat of harm than powder cocaine, the Commission concluded that the fact that African Americans continue to be disproportionately subjected to these irrationally harsh sentences significantly contributes to the perception that the law is unfair and that the criminal justice system is biased, and thus requires a change in the 100:1 ratio.

Those same points have been echoed repeatedly by members of the federal judiciary, who witness first hand the unfairness that the Guidelines currently impose. Even in the years before *Booker*, the federal courts repeatedly concluded that the crack Guidelines are "greater than necessary" to accomplish the purposes of punishment. In 1997, for example, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine, in . . . the guidelines can not be justified and results in sentences that are unjust and do not serve society's interest." Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), reprinted in 10 FED. SENT'G REP. 195 (1998). More recently, U.S. Circuit Judge Michael McConnell of the Tenth Circuit has called the crack Guidelines "virtually indefensible," *United States v. Pruitt*, 487 F.3d 1298, 1315 n.3 (10th Cir. 2007) (McConnell, J., concurring), and numerous other courts – both district courts and the Courts of Appeals – have likewise questioned the fairness of the Guidelines.[7] Indeed, these views are

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[7] *See also, e.g., United States v. Ricks*, No. 05-4832, -- F.3d --, 2007 WL 2068098, at *7 (3d Cir. July 20, 2007) (100:1 ratio "leads to unjust sentences"); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995) (concluding that crack disparity "raise[s] troublesome questions about the fairness of the crack cocaine sentencing policy"); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994) (concluding that "[a]lthough Singleterry has not established a constitutional violation, he has raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances"); *United States v. Walls*, 841 F. Supp. 24, 31 (D.D.C. 1994) ("[T]he disparity between the crack and powder penalties and the heavy impact of that disparity on black defendants is manifestly unfair."), *aff'd in part*, 70 F.3d 1323 (D.C. Cir. 1995); *United States v. Willis*, 967 F.2d 1220, 1226

widely shared throughout the legal community: as the Commission itself recognized, the crack Guidelines have been roundly condemned by "representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups" alike. 2007 Report at 2.[8]

Just as telling, this same belief that the Guidelines are fundamentally unfair is shared by the public at large. As part of its mission to evaluate the Guidelines in terms of the § 3553(a) factors, the Sentencing Commission contracted with two outside researchers, Dr. Peter H. Rossi of the University of Massachusetts, Amherst, and Dr. Richard A. Berk of the University of California at Los Angeles, to assess public opinion on federal sentences. Rossi and Berk found that the public is highly critical of the heavy Guidelines sentences for crack offenses and, instead, believes that cocaine and crack offenses deserve identical terms of imprisonment. *See* Peter H. Rossi & Richard A. Berk, U.S.

(8th Cir. 1992) (Heaney, J., concurring) (affirming 15-year crack sentence but suggesting that Congress had no "sound basis to make the harsh distinction between powder and crack cocaine," and quoting with approval district judge's description of the sentence as a "tragedy"); *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994); *United States v. Patillo*, 817 F. Supp. 839, 843-44 & n.6 (C.D. Cal. 1993).

[8] *See, e.g.*, William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1835 (1998) ("If there is anything at all to the proposition that biased enforcement and punishment undermine the law's normative force, this sentencing disparity ought to be abolished, or at least dramatically reduced."); *see also* Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity -- The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 87 (2003); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999); William J. Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1255 (1996); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1288-99 (1995)

Sentencing Commission, *A National Sample Survey: Public Opinion on Sentencing Federal Crimes* ch. 4 at 66-67 & Table 4.7, & ch. 5 at 80 (1995), available at http://www.ussc.gov/nss/jp_exsum.htm (noting that there is "little support in public opinion for especially severe sentences for drug trafficking and little support for singling out crack cocaine for special attention"). In general, "the public does not regard trafficking in [crack cocaine] as more serious than dealing in either powder cocaine or heroin . . . [and] trafficking in crack cocaine should not be singled out for especially severe punishments." *Id.*, ch. 4 at 78.

The result, as the Commission realized, is a perversion of the criminal justice system and the goals of the Sentencing Reform Act. The widespread perception of the crack Guidelines as unjust results in a disrespect for the law which may actually increase crime and make law enforcement more difficult. *See, e.g.*, Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1165 (2006) (explaining that "prominent legal theorists" and "a broad array of recent empirical studies" support the notion that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves"); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 597-98 (2003); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005) (reviewing the literature and reporting new experimental evidence that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185 (2004) ("As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught."); Tom R. Tyler, WHY PEOPLE OBEY

THE LAW 3-4 (1990) (explaining that cooperation with the law depends on the perception that the law is "just").

Moreover, the "perceived improper unwarranted disparity based on race fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine." 2002 Report at 103.

In short, the crack Guidelines represent a stain on the criminal justice system, disproportionately affecting African Americans without any legitimate penological justification and engendering a disrespect for the law that undermines the criminal justice system itself.

II. A DISTRICT COURT'S CONSIDERATION OF THE SEVERE RACIAL DISPARITIES RESULTING FROM APPLICATION OF THE FEDERAL SENTENCING GUIDELINES IS REASONABLE UNDER FEDERAL LAW.

A. Consideration of Racial Disparities in Cocaine Sentences is Consistent with *Booker*, *Rita*, and 18 U.S.C. § 3553(a).

In *Booker*, this Court held that mandatory application of the Guidelines violated the Sixth Amendment. 543 U.S. 220. The Court therefore held that the Guidelines must be treated as advisory, and as only one of a number factors that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a). Judges are now required to determine the Guidelines sentence and "filter the Guidelines' general advice through § 3553(a)'s list of factors." *Rita*, 127 S. Ct. at 2469. It is the sentencing judge's obligation to "subject[] the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Id.* at 2465.

As this Court acknowledged in *Rita*, a sentencing judge may entertain arguments that a sentence based solely on a Guidelines calculation reflects "unsound judgment," *id.* at 2468, fails to "generally treat certain defendant characteristics in the proper way," *id.*, or "fail[s] properly to reflect § 3553(a) considerations," *id.* at 2465, so long as the district court conducts an appropriately individualized analysis. According to § 3553(a), a district court must seek to ensure that the defendant's sentence "reflect[s] the seriousness of the offense, ... promote[s] respect for the law, and ... provide[s] just punishment for the offense," § 3553(a)(2)(A). It must also seek "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), and "protect the public from further crimes of the defendant," § 3553(a)(2)(C). Under such circumstances, even if the sentence falls below the Guidelines, it may be upheld. *Rita*, 127 S. Ct. at 2467 (no "presumption of unreasonableness" for below-Guidelines sentences).

In light of these decisions, it is entirely reasonable for district court judges to consider the empirical studies and recommendations of the Sentencing Commission, including its findings regarding vast racial disparities, in fashioning appropriately individualized sentences that comport with the mandates of § 3553(a). This is because the "sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives . . . ." *Rita*, 127 S. Ct. at 2463. And, in fact, the Sentencing Commission originally drafted the Guidelines, including for crack cocaine sentences, with the considerations of § 3553(a) in mind. *See id.* (citing 28 U.S.C. § 994(f), 994(m)). Since 1995, however, the Commission has determined that the Guidelines as originally drafted do not carry out those purposes. *See supra* Section I(B) at 8-9.

Thus, when a district court sentences an individual crack cocaine offender to a below-Guidelines sentence based, in part, on consideration of the effects of the 100:1 ratio in the particular case, the court acts in concert with the opinions of the Sentencing Commission. This fact *bolsters* the likely reasonableness of the sentence. *See Rita*, 127 S. Ct. at 2465 ("[W]hen the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) . . . , it is probable that the sentence is reasonable."); *see also id.* at 2467 ("[W]here judge and Commission *both* determine that the Guidelines sentences is an appropriate sentence for the case at hand, that sentence likely reflects the § 3553(a) factors (including its 'not greater than necessary' requirement).").

B. Courts Can Properly Consider the Disparities Caused by the Crack Cocaine Guidelines as Part of an Individualized Sentence Determination Without Categorically Rejecting the Ratio or the Guidelines.

A panel of the Third Circuit recently articulated a standard that is fully consistent with *Booker*, *Rita*, and § 3553(a), in providing guidance to a district court on remand:

> Although district courts may not categorically reject the 100-to-1 ratio, they may . . . "consider the crack/powder cocaine differential in the Guidelines as a factor" when sentencing defendants. . . . They should first calculate the correct Guidelines range and rule on any departure motions . . . .[then,] considering the individual circumstances of a defendant and the specific crime, district courts should consider the relevant § 3553(a) factors. It is at this stage (step 3)

> that courts may consider the crack/cocaine differential as it applies to the particular case before them. . . . .
>
> While the views of the Sentencing Commission may not be used to justify a new ratio altogether, district courts may consider the analysis in the Commission's reports when applying the § 3553(a) factors to a specific case and defendant. For example, the Commission's reports, as well as other sources, can inform the § 3553(a) analysis of "the nature and circumstances of the offense" or "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, . . . to provide just punishment for the offense . . . [and] to afford adequate deterrence to criminal conduct."

Ricks, 2007 WL 2068098, at *6 (citations omitted). We urge the Court to adopt and apply this standard.

C. The District Court, in Sentencing Mr. Kimbrough, Engaged in an Individualized Evaluation of the Statutory Factors Consistent with Federal Law.

Under the standard articulated in *Ricks*, the sentencing decision of Judge Jackson below was reasonable. After calculating the sentence according to the advisory Guidelines, the court explicitly stated that it was evaluating the individual facts and record in terms of the § 3553(a) factors. After a review of the factors, Judge Jackson detailed how those case-specific factors, taken together, warranted a below-Guidelines sentence. See Pet. App. 24a-25a, C.A.J.A. 48-49 (explaining that "given the record here," a sentence calculated using only the Guidelines was excessive).[9] The

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[9] The district court sentencing Mr. Kimbrough explained:

> The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to

court considered factors such as the nature and circumstances of the offense, the defendant's family ties, and the defendant's military contributions. *Id.* The court also considered the Commission's recommendations and the effect of the 100:1 ratio on Mr. Kimbrough's sentence. *Id.* After considering a variety of contributing factors, the court explained that if it were to "follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case." Pet. App. 27(a), C.A.J.A. 51. The district court considered the need for the sentence to reflect the basic aims of sentencing and concluded that 180 months -- the mandatory minimum permitted by Congress -- was "clearly long enough under the circumstances." Pet. App. 28a, C.A.J.A. 52. In this particular case, a rote application of the Sentencing Guidelines did not comport with the mandate of § 3553(a). This was precisely the analysis the statute directs sentencing courts to perform when sentencing a defendant and that this Court described in *Rita*. It is also consistent with the standard outlined in *Ricks*.

Nevertheless, the Court of Appeals vacated the District Court's sentence because it was "based, in part, on the district court's disagreement with the disparity between sentences for crack and powder cocaine violations," Pet.

> afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed education or vocational training, medical care or other correctional treatment in the most effective way. . . . One thing the statute tells the Court to do [is that] in fashioning a sentence, the Court is not to impose a sentence that is greater than necessary to accomplish the factors I have just outlined. . . . [T]o impose a sentence of 19 to 22 years in this case is ridiculous . . . [because] [i]t imposes more punishment, given the record here, than is necessary to accomplish what needs to be done.

Pet. App. 24a-25a, C.A.J.A. 48-49.

App. 2a, applying its ruling in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), that "a sentence that is outside the guidelines range is per se unreasonable when it is based [even in part] on a disagreement with the sentencing disparity for crack and powder cocaine offenses," Pet. App. 2a. The Fourth Circuit erred in so holding because it mischaracterized the district court's § 3553(a) determination as a "disagreement" with the Guidelines. To hold that a sentencing judge can never "disagree" with a sentence calculated using the 100:1 ratio makes the Guidelines mandatory. Such a holding is contrary to *Booker*, and also fails to give effect to Congress's intention that sentences reflect judges' evaluation of a series of additional factors set forth in 18 U.S.C. § 3553(a). Where, as here, a court considers, as one factor among others, the impact in an individual case of severe racial disparities resulting from a mechanical calculation of the Guidelines, the decision to deviate from those Guidelines is reasonable and consistent with federal law.

The court in this case evaluated the facts surrounding Mr. Kimbrough's individual case, determined that the Guidelines range failed to reflect the § 3553(a) factors, and imposed a sentence below the Guidelines range in order to better comport with the purposes of sentencing set forth in § 3553(a). The decision to do so was reasonable and should be affirmed.

CONCLUSION

For these reasons, *amicus* urges the Court to reverse the decision below.

Respectfully submitted,

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BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 551 U.S. __ (2007), for an appellate court to require that a sentence which lies outside the Guidelines range be justified by "extraordinary circumstances"?

2. May judges consider whether the Guideline ranges applicable to a given category of offenses fail to represent a sound balancing of all the factors pertinent to selecting the sentence for a particular case or group of cases within that category?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice and to ensure that criminal sentencing comports with our Constitution. NACDL's intense concern for protecting fundamental Fifth and Sixth Amendment rights has led it to appear frequently as *amicus curiae* in this Court, including in *Rita v. United States*, 551 U.S. __ (2007), *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296, 312 (2004) (noting NACDL's position), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised the provision of the Sentencing Reform Act requiring judges to sentence within the Guidelines range "[i]n most cases," *id.* at 234, because the Sixth Amendment prohibits a sentence "outside the range authorized by the jury verdict," *id.* at 240. After *Booker*, the district court must choose a sentence based on the factors listed in 18 U.S.C. § 3553(a)—including its requirement, found in subsection (a)(4), that the court consult the applicable Guidelines range—and the court of appeals reviews that sentencing decision for reasonableness. Nonetheless, after *Booker*, the Guidelines have continued, in practice, to exert much the same force as before. The Department of Justice requires

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

prosecutors to "actively seek sentences within the range established by the Sentencing Guidelines *in all but extraordinary cases*."[2]

Of particular significance in the two cases now before the Court, some courts of appeals, echoing the government's position, have held that a judge may not impose a sentence materially different from that recommended by the Guidelines absent "extraordinary circumstances," *see, e.g., United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005), and some have deemed "per se unreasonable" *any* non-Guidelines sentence that is "based on a disagreement" with the Sentencing Commission's balancing of factors for categories of cases, *United States v. Kimbrough*, No. 05-4554 (4th Cir. 2006), *Kimbrough* Pet. App. 2a (referring to "disagreement with the sentencing disparity for crack and powder cocaine offenses"). As a result, many important sentencing factors that judges are duty-bound to consider must nonetheless be given no significant weight on the premise that the Sentencing Commission has supposedly already taken them into account and incorporated them into (or disallowed them under) the Guidelines system itself. *See, e.g., United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (below-Guidelines sentence where defendant was the sole custodial parent of two small children was unreasonable, because "[f]amily ties and responsibilities" are an expressly "discouraged factor" under the Guidelines).

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[2] Memorandum from James B. Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) at 2, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files-/dag_jan_28_comey_memo_on_booker.pdf (emphasis added); *id.* at 1 (prosecutors must "take all steps necessary to ensure adherence to the Sentencing Guidelines"). Consistent with this directive, the AUSA in *Kimbrough* objected to *any* sentence other than that within the Guidelines range. *Kimbrough* Pet. App. 30a. Whether this Court's decision in *Rita v. United States*, 551 U.S. __ (2007), will serve to rein in that tendency remains to be seen.

There are two fundamental defects in these approaches. *First*, these two rules do at least as much violence to the Sixth Amendment as the law this Court struck down in *Blakely v. Washington*, 542 U.S. 296 (2004). Under that state statute, the judge was merely *allowed* to impose a sentence exceeding the maximum authorized by "*facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). To forbid a so-called substantial deviation from the range specified by the United States Sentencing Guidelines absent extraordinary circumstances—and without an opportunity to challenge the soundness of the judgment reflected in a Guidelines calculation—is more detrimental to the defendant's Sixth Amendment rights than the Washington provision. The federal judge's findings of fact would *require* imposition of a sentence greater than that authorized by the jury's findings unless *the defendant* carries the heavy burden of proving extraordinary mitigating circumstances. In the typical case—*i.e.* a case where extraordinary mitigating circumstances are not present—the result *must* be a sentence that "the jury's verdict alone does not authorize." *Id.* at 305. Such a "remedy" is foreclosed by the Sixth Amendment. *Booker*, 543 U.S. at 234 (holding mandatory Guidelines unconstitutional because the judge is "*bound*" to a within-Guidelines sentence in "most cases") (emphasis added).

Second, even if *Blakely* and *Booker* could permit a system that heavily relies on the Guidelines, the theoretical and empirical bases for these two tools of appellate review are demonstrably false. The Sentencing Commission decided it was not feasible to construct a system producing sentences designed to achieve each purpose of sentencing listed in Section 3553(a)(2). Moreover, the Commission did not, because it could not, implement a system that differentiates between particular defendants based on the Section 3553(a) factors, most notably differences in the "history and characteristics" of otherwise similarly-situated defendants. *See* 18 U.S.C. § 3553(a)(1). Thus, because certain Section 3553(a) factors as applied to a particular case may be at the same time both

"ordinary" and inadequately accounted for in the Guidelines, the rules imposed by the Fourth and Eighth Circuits in these two cases require district judges to abdicate their duties under Section 3553(a).

The proper formulation of reasonableness review—a formulation that complies with the Sixth Amendment, is true to the language of the SRA, and recognizes the limitations inherent in the Guidelines—is one that gives the district court appropriate deference under the abuse of discretion standard fashioned by this Court in *Rita* and *Booker* and that focuses on whether the district judge considered *all* of the pertinent statutory factors as they apply to that *particular* case. The court of appeals should also examine whether the judge, after considering those factors, complied with the duty to impose a sentence sufficient, but "not greater than necessary" to achieve the statute's purposes. 18 U.S.C. § 3553(a). This inherently individualized process is not aided by requiring extraordinary circumstances before a sentence can "deviate" from a so-called "benchmark" that was created for classes of cases and that will frequently be the product of an incomplete or even erroneous assessment of the very factors and purposes *judges* must consider on a case-by-case basis.

ARGUMENT

I. A Requirement Of Extraordinary Circumstances For Sentences That Differ In A Nontrivial Manner From Those Suggested By The Guidelines, And A Prohibition On Taking Into Account Whether The Guidelines Reflect An Unsound Judgment, Are Each Inconsistent With This Court's *Booker* Decision.

The Eighth Circuit's requirement of extraordinary circumstances for what it deems a substantial "variance" from the Guidelines violates the Sixth Amendment because in the application of that standard to the "ordinary" defendant—one whose circumstances fall short of "extraordinary"—the dis-

trict court not only is *permitted* to impose a sentence greater than that available based on jury findings alone; it is *required* to do so. The Sixth Amendment forbids either result. *See Blakely*, 542 U.S. at 305 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.") (emphases in original). Similarly, the rule applied in *Kimbrough*—that it is "per se unreasonable" to rely on a "disagreement" with the judgment reflected in a Guidelines provision when justifying a sentence outside the recommended range—restricts the discretion of judges in a manner indistinguishable from the provision that was excised from the Sentencing Reform Act in order to make the Guidelines advisory. *See* 18 U.S.C. § 3553(b)(1). Thus, on constitutional grounds alone, these two modifications to the reasonableness standard of review for federal sentences must be rejected. This issue is properly before this Court because (i) both rules present a multitude of constitutional problems, and (ii) *Booker* held that Congress did not intend one set of rules for sentences above the Guidelines and a different set for those below.

A. The Standards Employed By The Fourth and Eighth Circuits Violate The Sixth Amendment.

1. The extraordinary circumstances requirement resurrects the feature of the mandatory Guidelines that violated the Sixth Amendment. Under the Eighth Circuit's test, a district court may not substantially "deviate" above or below the advisory range unless the judge finds facts that establish extraordinarily aggravating or mitigating circumstances. The less aggravating (or mitigating) the circumstances the judge finds, the smaller the allowed "deviation" from the advisory range. *See, e.g., United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006) ("How compelling [the] justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed."). The very phrasing of the Eighth Circuit's "extraordinary circum-

stances" requirement illustrates its inconsistency with the advisory Guidelines remedy adopted in *Booker*. The Eighth Circuit's formulation continues the pre-*Booker* requirement that district judges treat the Guidelines range as the presumptive sentence—a substantive starting point—with the reasonableness of any other sentence judged by the extent to which it "deviates" or "varies" from that presumptive range. Gall Pet. App. A 8-9 ("'the farther the district court varies from the *presumptively reasonable* guidelines range, the more compelling the justification based on the § 3553(a) factors must be'" (emphasis added) (citation omitted)). Such a presumption at the district court level for Guidelines sentences is no longer an option. *See Rita*, slip op. at 11-12 (emphasizing that the presumption of reasonableness for a within-Guidelines sentence only operates at the appellate level; it may not be used by district judges).

The extraordinary circumstances requirement thus restores the Guidelines to a position that violates the Sixth Amendment. In particular, because the circumstances in the mine-run of cases are—by definition—not "extraordinary," in most instances this rule prevents judges from imposing a sentence substantially outside the advisory range. Allowing judges to venture substantially above or below a Guidelines range in the "extraordinary" case is no cure for the Sixth Amendment defect, just as the mandatory Guidelines were not saved by the ability to depart in special cases. *See Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself."); *see also* 18 U.S.C. § 3553(b)(1) (provision that, until it was excised, permitted a sentence outside the Guidelines range only where there existed "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission").

Indeed, forbidding substantially higher or lower sentences absent a finding of extraordinary circumstances institutes a regime indistinguishable from that invalidated in

Blakely. The state law in *Blakely* similarly limited a defendant's sentence to a "standard range," dictated by the offense of conviction, unless the judge found "'substantial and compelling reasons justifying an exceptional sentence.'" 542 U.S. at 299. This Court held that a sentence above the standard range, based on the judge's finding that Blakely had acted with deliberate cruelty, violated the Sixth Amendment because it exceeded the penalty the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis omitted).

Unlike the appellate presumption of reasonableness upheld in *Rita*, the requirement of "extraordinary circumstances" presents a "multitude of constitutional problems" that are far from hypothetical. *Cf. Rita*, slip op. at 14. As noted, the constitutional problem will exist as to every "ordinary" defendant, for whom any significant "deviation" from the Guidelines is forbidden under the Eight Circuit's rule. Absent the defendant's waiver of his Sixth Amendment rights, judge-made findings will be involved in a significant number of these "ordinary" cases, and they will spell the difference between reasonable and unreasonable sentences under the Eighth Circuit test. For instance, in drug cases, which represent about 35% of all federal sentences,[3] the "base" offense level is determined largely by the quantity of drugs deemed "relevant" under a unique and complex set of rules set forth in the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 1B1.3. This "relevant" quantity can include drugs involved in counts that were dismissed, and

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[3] U.S. Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics*, Distribution of Offenders in Each Primary Offense Category, *available at* http://www.ussc.gov/ANNRPT/2006/Figa.pdf (for 35.5% of sentenced defendants, drug violations were the primary offense). The available data for fiscal year 2007 show a small increase. U.S. Sentencing Commission, *Preliminary Quarterly Data Report (2nd Quarter Release 2007)* at 39, *available at* http://www.ussc.gov/sc_cases/Quarter_Report_2Qrt_07.pdf (36.3% of sentenced defendants).

even counts of which the defendant was acquitted or for which there was no charge at all. *See, e.g., United States v. Watts*, 519 U.S. 148 (1997) (per curiam).[4]

Fanfan's case (which was consolidated with Booker's) illustrates the problems faced by virtually all drug defendants under the extraordinary circumstances test. The findings by the jury convicting Fanfan supported a Guidelines range of 63-to-78 months. *Booker*, 543 U.S. at 228. The extraordinary justification rule, however, would have compelled Fanfan's judge to sentence him within or not significantly outside the 188-to-235 month range based on *judicially*-found facts. Indeed, the court would have been required to sentence Fanfan to well above the *maximum* of the range supported solely by the jury's findings unless *the judge* could find *additional*, mitigating facts—facts extraordinary enough to support a sentence almost ten years below the judicially-determined range.

Many other Guidelines also dictate higher sentence ranges based on findings made by the judge rather than the jury, not the least of which are those for theft and fraud cases. *See* USSG § 2B1.1 (numerous aggravating factors, including potentially significant enhancements for amount of loss); *2006 Sourcebook of Federal Sentencing Statistics* (10 percent

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[4] Moreover, the Guidelines Manual contains many more levels of gradation for drug quantity than does the statute defining the offense. *Compare* 21 U.S.C. § 841(b)(1) (containing three levels of penalty gradation due to drug quantity for most controlled substances, including cocaine, cocaine base (crack), heroin and marijuana) *with* USSG § 2D1.1(c) (containing at least 14 different offense levels for such drugs). The Guidelines, rather than mandatory minimums, dictate the sentence in a large number of drug cases. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("*Fifteen Year Report*") (2004), http://www.ussc.gov/-15_year/15year.htm (determining that, as of 2001, more than 25 percent of the average expected prison time for drug offenders can be attributed to Guideline increases above the statutory mandatory minimum penalty levels).

of cases). In sum, the extraordinary circumstances requirement *compels* sentences within or proximate to sentencing ranges enhanced by judicial fact-finding—that is, facts neither found by the jury nor admitted by the defendant—in all but the most exceptional cases, much like the unconstitutional "mandatory guidelines" system did before *Booker*.

In its brief in *Claiborne v. United States*, No. 06-5618, the government defended the extraordinary circumstances test against a Sixth Amendment challenge by arguing that under the advisory Guidelines a judge retains the authority, armed solely with jury findings, to impose a sentence up to "the statutory maximum provided in the United States Code." Resp. Br. in *Claiborne* 41-42. But under the government's extraordinary circumstances test, that simply is not true. The jury finds the bare elements of an offense, and such findings—because they are the same for any trial involving the same alleged statutory violation—do nothing to establish why the particular case might be extraordinary, let alone extraordinary enough to warrant the statutory maximum sentence. *See* Resp. Br. in *Claiborne* 43 (identifying "extraordinary circumstances" as those factors that "substantially distinguish [the defendant] from the hundreds of other defendants who share the same general characteristic."); *see also Cunningham v. California*, 549 U.S. __, __ (2007), slip op. at 6 (Alito, J., dissenting) (noting that a judge would not be able to justify the statutory maximum sentence in a mail fraud case without finding additional facts at sentencing).

The government argues that the "extraordinary circumstances" test has no application to insubstantial "variances" from the Guidelines range in non-extraordinary cases. *See* Resp. Br. in *Claiborne* 38. This is not so. Many circuits apply the test to require additional factfinding for *any* non-Guidelines sentence. *See* Gall Br. 10 n.2. In any event, it would not cure the Sixth Amendment violation to know that insubstantial "variances" from the Guidelines range could be accomplished without additional non-jury findings. Even *that* version of the extraordinary circumstances test does

nothing more than resurrect mandatory Guidelines ranges with an "insubstantial" number of months tacked on to each end of the range.[5] The result of the government's test, there-

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[5] It is far from clear how one determines when the line between insubstantial and substantial (or between ordinary and extraordinary) has been crossed. *See* Gall Pet. App. A 9 ("extraordinary" variances); *Claiborne*, 439 F.3d at 481 ("substantial" variances). Even if such a line could be devised in theory, it would be unworkable in practice due to the presence of many variables and the non-uniform structure of the table of sentencing ranges. These features prompt multiple questions for which there are no easy answers. For example, should "substantial" or "extraordinary" variances be based on the absolute number of months or a percentage calculation? The choice has a significant effect, especially at the low and high ends of the sentencing table. How should the breadth of the range affect the drawing of the line? The sentence ranges in the Guidelines Manual vary greatly in their breadth—as few as six months between top and bottom at the low end of the table; as many as 81 months near the high end—and others defy quantification altogether, such as "360 months to life" and "life." Should a substantial upward variance from a particular range always be the same number of months (or percentage difference) as a substantial *downward* variance from the same range, or should "substantial upward" mean something different than "substantial downward" depending on where the range falls in the table? Near the high and low ends of the table a percentage approach would lead to very different results than an absolute approach. How are probationary sentences—such as petitioner Gall's—accounted for, especially when they can come with conditions that are akin to imprisonment (*e.g.*, home confinement, confinement in a community correctional center, confinement in a jail on weekends), or conditions less like imprisonment but nonetheless onerous (*e.g.*, travel restrictions, reporting requirements, and employment and community service mandates, all of which can differ significantly from case-to-case in their severity), or varying combinations of the two. (The Eighth Circuit would deem *any* non-Guidelines sentence of probation, no matter how low the minimum of the Guidelines range, "a 100% downward variance" because the defendant "will not serve any prison time." Gall Pet. App. A 9. But probation is not like a shorter prison term; it is an entirely different kind of sentence. 18 U.S.C. § 3551.) Whatever the answers to these questions, the government's test assumes that for any given Guidelines range a number of months above and (perhaps a different) number of months below the range will mark the dividing line between ordinary/insubstantial and extraordinary/substantial variances.

fore, is a new *de facto* set of Guidelines ranges—a bit larger than the ranges in the Manual,[6] but ranges nonetheless. Instead of a requirement of extraordinary circumstances to sentence outside the ranges in the Manual, the proposed test requires extraordinary circumstances to impose a sentence outside the somewhat larger *de facto* range.[7] Nothing in *Booker* supports the notion that Congress can cure the Sixth Amendment violation by reinstituting mandatory Guidelines ranges and simply making them a bit wider. The courts of appeals are likewise barred from creating such a remedy through the reasonableness standard of review.

2. The rule applied by the Fourth Circuit in *Kimbrough* suffers from the same constitutional defect. It prevents a sentence from being based, even in part, on the judge's reasoned conclusion that the Commission struck an improper balance when weighing Section 3553(a) factors for a particular category or sub-category of offenses. *Kimbrough* held it was "per se unreasonable" for a non-Guidelines sentence to be based to any extent on the court's "disagreement with the sentencing disparity for crack and powder cocaine offenses." *Kimbrough* Pet. App. 2a. The Sentencing Commission itself has recognized that the purposes of punishment do not invariably require that trafficking in a given amount of crack be treated the same as trafficking in 100 times that amount of

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[6] By statute (and with limited exceptions), the top of a sentencing range may be no more than 25 percent greater than the bottom of that range. 28 U.S.C. § 994(b)(2). For example, the Guidelines are allowed to (and do) have a range of 100-to-125 months, but they could not have a range of 100-to-140 months.

[7] Another example illustrates the constitutional violation. Suppose a defendant's Guidelines range is 33-to-41 months, and the statutory maximum is 120 months. Assuming any sentence greater than 60 months would be a "substantial variance," a judge could not impose such a sentence without finding the existence of extraordinary circumstances. Any sentence between 60 and 120 months would therefore exceed the maximum authorized by facts reflected in the jury verdict or admitted by the defendant.

powder cocaine. U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002). The sentencing judge in *Kimbrough* reasoned from the available information that the differences between the circumstances of petitioner's crack offense and the circumstances of many powder cocaine offenses were not so great as to require imposition of the dramatically more severe within-Guidelines sentence.[8] The Fourth Circuit's holding prevents a judge from ever concluding that the Commission's "wholesale" rule for crack offenses creates sentences greater than necessary at the "retail" level of sentencing. *Cf. Rita*, slip op. at 9 (noting that the Commission and the sentencing judge separately carry out the Section 3553(a) objectives: "the one, at retail, the other at wholesale").

Judges must be free to conclude, based on reasoned analysis, that the Commission's balancing of factors produces sentences that are either too lenient ("[in]sufficient") or too severe ("greater than necessary"). If not, then their discretion will be at least as limited as it was under the mandatory regime that this Court invalidated on Sixth Amendment grounds. Section 3553(b)(1), now excised, had required judges to impose a Guidelines sentence unless they found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" and that "should result in a" non-Guidelines sentence. To prohibit sentencing courts from questioning the Commission's judgment with respect to those circumstances that it *did* take into consideration in formulating the Guidelines is to limit the judicial inquiry to whether the Commission in fact took the

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[8] The district judge did not treat crack and powder cocaine on anywhere near an equal footing. Had the crack cocaine that Kimbrough possessed still been in powder form, he would have faced no mandatory minimum term and could have received a within-Guidelines sentence of 30 months rather than the 120 months the court imposed for that count. *Kimbrough* Pet. App. 22a.

circumstances into consideration *at all*. Because that is at least as narrow as the inquiry whether the Commission "adequately" took a circumstance "into consideration," the rule adopted by the Fourth Circuit simply resurrects the provision that this Court excised to cure the Sixth Amendment defect in the Guidelines.

3. Given the restraints imposed by the Fourth and Eighth Circuits, it should come as no surprise that reasonableness review in those courts has prevented judges from imposing non-Guidelines sentences unless they meet the criteria for departures under the mandatory regime. *See, e.g.*, *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (below-Guidelines sentence based on the defendant's cooperation was unreasonable, because that "departure" exceeded the Guidelines' limits on "substantial assistance" downward departures); *United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (reversing below-Guideline sentence based on the defendant's efforts to obtain employment, his level of education, the non-use of a firearm, and his likelihood of contributing to society, because those factors are excluded from the Guidelines).

These courts have simply resurrected 18 U.S.C. § 3742(e)—the appellate review provision excised in *Booker*. That statute directed courts of appeals to determine, among other things, whether a sentence "departs from the applicable guideline range based on a factor that . . . is not authorized under section 3553(b)" or "departs to an unreasonable degree from the applicable guidelines range, having regard for" the Section 3553(a) factors and the reasons stated by the district court. 18 U.S.C. § 3742(e)(3). The Fourth Circuit's rule prevents judges from sentencing outside the Guidelines unless the factor is "authorized under section 3553(b)" (that is, unless the Commission has failed to adequately take the circumstance into account), and the Eighth Circuit's rule examines whether the sentence "departs to an unreasonable degree from the applicable guidelines range." Just as Section 3742(e) needed to be excised to effectuate the remedy

adopted in *Booker*, the Sixth Amendment bars the adoption of appellate review tools that largely revive the mandatory Guidelines system. Under the "extraordinary deviation" rule, it is exactly as if § 3553(b)(1) had never been stricken from the statute. But it was the judicial striking of that section that rescued the Act from its constitutional flaw. It follows that the tests applied below revive the Sixth Amendment violation thought to have been remedied in *Booker*.

B. The Sixth Amendment Issue Is Properly Before The Court.

The Sixth Amendment forbids sentences greater than those authorized by the jury's findings. Petitioners Gall and Kimbrough received sentences *below* the Guidelines ranges that were calculated in their cases, and the courts of appeals reversed using the rules of appellate review at issue here. The Court must reject these rules on Sixth Amendment grounds, regardless of whether their application in these two cases violated petitioners' constitutional rights. That is because (i) both rules present a multitude of constitutional problems, and (ii) *Booker* held that Congress did not intend one set of rules for sentences above the Guidelines and a different set for those within or below the Guidelines. *Booker*, 543 U.S. at 266; *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (in deciding between two interpretations of a statute, "[i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain *to the particular litigant before the Court*.") (emphasis added).[9]

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[9] That is not to say, however, given the statute's preference for the more parsimonious sentence, that review of sentences above the recommended range should not be subject to more stringent scrutiny than is applied to sentences within or below. The more severe the sentence, after all, the more likely it is to be "greater than necessary." 18 U.S.C. § 3553(a).

In *Rita*, the Court rejected the petitioner's Sixth Amendment "concerns," *Rita*, slip op. at 12, holding that an appellate presumption of reasonableness for a Guidelines sentence "does not violate the Sixth Amendment." Slip op. at 13. In particular, the Court noted that this "nonbinding appellate presumption . . . does not *require* the sentencing judge" to impose a Guidelines sentence, and "[s]till less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." *Rita*, slip op. at 14 (emphases in original). The same cannot be said for the rules at issue in *Gall* and *Kimbrough*. As noted *supra*, if a judge needs to find extraordinary circumstances to impose a sentence significantly higher than the judicially-determined sentence range—let alone a sentence significantly higher than that authorized by the jury's verdict—then the Eighth Circuit's requirement *does* forbid the judge from "imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." The judge in *Fanfan*, for example, could not have imposed a sentence above or even *within* the petitioner's Guidelines range of 188-to-235 months based solely on jury-determined facts. *Booker*, 543 U.S. at 228.

As the Court made clear in *Rita*, an appellate presumption of reasonableness for a within-Guidelines sentence is not a presumption of unreasonableness for a non-Guidelines sentence. *Rita*, slip op. at 15. *Rita* therefore had no occasion to address when a non-Guidelines sentence might be unreasonable. The instant cases squarely present the issue. Moreover, under this Court's rulings in *Booker* and *Clark*, review for reasonableness for sentences below the Guidelines must be fashioned in such a manner that application of the same rule to sentences *above* the Guidelines does not violate the Sixth Amendment. *Clark*, 543 U.S. at 380-81; *Rita*, slip op. at 7 n.2 (Scalia, J., concurring) ("since reasonableness review should not function as a one-way ratchet, *United States* v. *Booker*, 543 U.S. 220, 257-258, 266 (2005), we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high").

To avoid the Sixth Amendment violations that would occur in many scenarios if the rules adopted by the Fourth and Eighth Circuits rules were allowed to stand, those rules must be rejected in these cases, too.

On constitutional grounds alone, the standards of review used in the Fourth and Eighth Circuits must be rejected.

II. Because Of The Inherent Limitations Of Any Guidelines System, And The Demonstrated Limitations Of The One In Place, A District Court Must Be Permitted To Conclude That The Guidelines Do Not Always Strike The Correct Balance And That Materially Different Sentences Are Justified In The Absence Of Extraordinary Circumstances

The Eighth Circuit's principal basis for requiring extraordinary circumstances for sentences significantly outside the Guidelines is that they supposedly "were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). As demonstrated below, despite aspirations to the contrary, the Guidelines do not manage to balance and incorporate *all* of the purposes of sentencing found in Section 3553(a)(2), much less do they differentiate individual defendants from one another based on *all* of the other factors a judge must consider under Section 3553(a) in each case. The Commission itself acknowledged, when first promulgating the Guidelines, that it was impossible to devise a guidelines system that captures and accounts for "the vast range of human conduct potentially relevant to a sentencing decision." USSG ch. 1, pt. A(4)(b) (1987). At best, the Guidelines, "insofar as practicable," represent "*a rough approximation* of sentences which *might* achieve § 3553(a)'s objectives." *Rita*, slip op. at 11 (emphases added). And while it is true that the Commission's amendment process was designed to carry out a continued refinement of the Guidelines to better approach these aspirations, in practice it

has not performed in that manner. Rather than move the Guidelines in the direction of balancing and incorporating Section 3553(a)'s sentencing purposes and factors, the amendment process has had the opposite effect.

A. The Guidelines Are Not The Product Of A Flawless Balancing Of All The Sentencing Purposes That A Judge Must Consider Under Section 3553(a)(2), But Of An Incomplete Empirical Approach Based On "Past Practice."

Section 3553(a)(2) of Title 18 requires judges to impose sentences that, among other things, "comply with" the following "purposes" of sentencing in each particular case: "reflect the seriousness of the offense"; "promote respect for the law"; "provide just punishment for the offense"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The judge must do so after "consider[ing]" other factors listed, inter alia, in § 3553(a)(1) and (a)(6).

One of the Commission's basic objectives is also to "assure the meeting of the purposes of sentencing as set forth in [§ 3553(a)(2)]." 28 U.S.C. § 991(b). As early as the first Guidelines Manual in 1987, the Commission acknowledged, however, that it was unable to take each of these purposes of sentencing into account in crafting Guidelines ranges. *See* USSG ch. 1, pt. A(3) (1987). This Court recognized as much in *Rita*, when it noted that the Commission did not attempt to balance (*i.e.*, "reconcile") the purposes of sentencing, taking an "empirical approach" instead. *See Rita*, slip op. at 9-10 (noting a "'philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment'" and that, "[r]ather than choose among [such] differing practical and philosophical objectives, the Commission took an 'empirical approach'"). As one original commissioner explained, "[r]ather than being

guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard 'fiddling with the numbers' that established the guidelines sentences." *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,121, 18,122 (May 1, 1987).

In the end, even the "past practice" benchmark was abandoned as to a large number of categories; the Commission chose to increase sentences for some offenses, but not others, through a series of "'trade-offs' among Commissioners with different viewpoints." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988). Over time, these "trade-offs" have worked to substantially lengthen sentences[10]—and so has the Commission's peculiar interpretation of "past practice," which has produced Guidelines ranges which do not reflect the large number of prior sentences that had resulted in probation. *See* Washington Legal Foundation Amicus Br. in *Claiborne* 11-12.

In sum, although the Commission may very well have done the best it could under the circumstances, it is abundantly clear—as this Court noted in *Rita*—that the ranges in that Manual are *not* the product of a *balancing* of the sentencing purposes every judge is required to consider under Section 3553(a)(2). And the Commission was never directed to incorporate most aspects of § 3553(a) other than the (a)(2) purposes into the Guidelines, even though those other factors are binding on judges in individual cases. As a result, the Guidelines may point to a result different from that obtained by a careful judicial balancing of those purposes even in so-called "ordinary" cases. For that reason, an extraordinary

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[10] Defendants sentenced in 2002 will spend, on average, twice as long in prison as those sentenced prior to the Sentencing Reform Act. *Fifteen Year Report* at 46, 47, and 49.

circumstances requirement has no place in an advisory Guidelines system.

B. The Guidelines Do Not Account For Important Section 3553(a) Factors, Such As The "History And Characteristics Of The Defendant."

In addition to their failure to take account of—much less carefully balance—each purpose of sentencing listed in Section 3553(a)(2), the Guidelines were not designed to differentiate between defendants with respect to the other Section 3553(a) factors that judges must consider but which the Commission was not directed in 28 U.S.C. § 991(b) or § 994 to implement. The Commission was charged, after all, with developing Guidelines applicable to "categories of offenses" and "categories of defendants," *id.* §§ 994(c)-(d), not with selecting sentences for individual cases.

1. Significantly, the Guidelines do not implement a vital component of subsection (a)(1)—the need to consider the "history and characteristics of the defendant." From the beginning, the Guidelines have produced sentencing ranges that take into account only one narrow slice of a defendant's "history and characteristics": the aggravating factor of prior criminal history. *See generally* USSG ch. 4. The original commissioners "extensively debated" whether the Guidelines ranges should be affected by offender characteristics beyond the defendant's criminal record, Breyer, 17 Hofstra L. Rev. at 19, but they were unable to reach a consensus and therefore decided "to leave other characteristics out." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 185 (1999).

The Guidelines ranges do not incorporate any other offender characteristics or any other aspects of their history. Instead, to the extent the Commission has addressed these factors, it expressly discourages or outright prohibits judges from considering them when computing a Guidelines range or when deciding whether to impose a Guidelines sentence.

These characteristics include, among others, family ties and obligations, USSG § 5H1.6 (p.s.), military service, *id.* § 5H1.11 (p.s.), community good works, *id.*, addictions and other dependencies, *id.* § 5H1.4 (p.s.).

The Commission's inability to incorporate these offender characteristics into the computation of a Guidelines range is unsurprising. It is *not* possible to quantify in a meaningful way—*i.e.*, one that differentiates defendants in the current grid of sentence ranges—such factors as a defendant's family obligations; the influence of addiction or other dependencies and difficulties on the commission of the offense; or the degree to which the defendant engaged in good works before or after committing the offense.[11] As one judge has observed, the Guidelines are "inescapably generalizations" that "say little about the 'history and characteristics of the defendant.'" *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez, J., dissenting). Moreover, an offender characteristic that warrants a significant sentence reduction in one case (*e.g.*, a history of strong family ties and responsibilities) might be less compelling than otherwise would be the case if coupled with other factors (*e.g.*, the defendant made a calculated decision to entice close family members into joining his criminal activity despite having a strong support system that gave him ample opportunity to lead a law-abiding life). Because the weight to be given any particular offender characteristic requires careful case-by-case consideration of the interplay of multiple factors, such characteristics are inherently unsuited to the generalizations required in any guidelines system.

As a result of the difficulty in accounting for offender characteristics in a system that must quantify and generalize

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[11] The one factor the Commission did incorporate—prior criminal history—is, in a number of ways, susceptible to an objective formula based on the number of prior convictions, the recency of past offenses, and their severity (as measured by length of sentence imposed or served). *See* USSG ch 4.

factors, with the exception of the aggravating factor of criminal history the Guidelines are focused *entirely* on the offense as opposed to the person who committed it. But even there they frequently fail to differentiate based on such things as criminal intent.[12] In choosing not to delineate "categories of defendants" based on these and other aspects of their offenses, the Guidelines cannot be said to already account for the factors in Section 3553(a)(1), particularly as those factors may arise in individual cases.

C. The Guidelines Have Not Eliminated Unwarranted Sentence Disparities.

Another statutory factor that judges must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Minimizing such disparities was one of the primary objectives of the Sentencing Guidelines, 28 U.S.C. § 994(f), but in a number of ways, the Guidelines have perpetuated and even aggravated the problem of unwarranted disparities.

As the Sentencing Commission has recognized, "unwarranted disparity" means the "[1] different treatment of *individual* offenders who are similar in relevant ways, or [2] similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." *Fifteen Year Report* at 113 (emphasis in original). The Guidelines, by limiting consideration of numerous factors

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[12] Even when considered, intent works in only one direction. Intended harms increase the sentence even if they do not occur. *See, e.g.*, USSG § 1B1.3(a)(3) (including "all harm that was the object" of acts and omissions) & 2D1.1. cmt. n.12 (drug quantity includes amounts attempted or agreed upon). Yet no reduction is made to account for harms that were unintended or controlled by law enforcement. *See, e.g., id.* (addressing controlled drug deliveries); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (noting that loss amount in many fraud cases "is a kind of accident" and thus a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence").

and circumstances (age, employment, military service, rehabilitation), have increased the second type of unwarranted disparity—*the like treatment of cases that are not truly alike*. Ilene Nagel, one of the original commissioners, acknowledged this problem—she dubbed it the "overreaching uniformity" of the Guidelines—noting that "the emphasis [in creating the first set of guidelines] was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 934 (1990).

The Guidelines also suffer severe shortcomings in addressing the other type of disparity—different treatment of individual offenders who are similar in relevant ways. Numerous studies have confirmed that because charge- and fact-bargaining occurs in a sizable number of cases, Guidelines ranges for defendants who should be identical in the eyes of the Guidelines will often be different.[13] For example Professor Stephen Schulhofer and former-Commissioner Nagel found that the Guidelines were circumvented in approximately twenty to thirty-five percent of all plea-bargains, Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290 & n.25 (1997), with the extent of the deviations from appropriate guideline calculations ranging between "modest" (ten to twenty-five percent) and "enormous" (seventy to ninety per-

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[13] Additionally, far from helping eliminate nationwide disparities as the government claims, the Guidelines have contributed to geographical disparities. *Fifteen Year Report* at 86; *see also* U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines*, at 66-67 (2003), http://www.ussc.gov/departrpt03/departrpt03.pdf ("Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs.").

cent), *id.* at 1292.[14] Ironically, it is the so-called "real offense" provisions (*e.g.*, the weapon and quantity enhancements in drug cases and the loss amount for economic crimes)—the centerpiece of guidelines sentencing (*see*, *e.g.*, *Fifteen Year Report* at 24-25)—that provide the most fertile ground for abusive plea negotiating tactics. *See* Nagel, 80 J. Crim. L. & Criminology at 937.[15]

Perhaps the most troubling manifestation of unwarranted sentencing disparity prevalent in the current guidelines system is the gap between average sentences of white and minority offenders. "[R]elatively small in the preguidelines era," this gap has grown substantially since the advent of the Guidelines. *Fifteen Year Report* at 115, 116, 120-27. The Commission itself has concluded that these disparities are not "a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges"; rather they are attributable to an "'*institutional unfairness*' *built into the sentencing rules themselves*." *Id.* at 135 (emphasis added) (internal citation omitted). Although the Commission specifically identified the 100:1 quantity ratio for powder and crack cocaine—a

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[14] Similarly, the federal probation offices in forty-three percent of all districts report that when "guideline calculations are set forth in a plea agreement, they are supported by offense facts that accurately and completely reflect all aspects of the case" *no more than half* the time. *Fifteen Year Report* at 86 (internal quotations and citations omitted). And in yet another survey, this one conducted by the Federal Judicial Center, three-quarters of district judges reported that plea bargaining is a "source of hidden unwarranted disparity in the guidelines system." Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 7, 9 (1997), *available at* http://www.fjc.gov/-public/pdf.nsf/lookup/gssurvey.pdf/SFile/gssurvey.pdf.

[15] In addition, there is the inevitable distorting effect of unintentional error by Probation Officers, attorneys and judges, much of it resulting from the very complexity of the Guidelines system itself. Unwarranted disparity which the Guidelines cannot control also results from the inevitable variation in skill and knowledge among defense counsel, a subject with which amicus NACDL is particularly familiar.

ratio that substantially increased petitioner Kimbrough's Guidelines range—and the career offender Guideline as provisions that have "unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing," it acknowledged there may be "many others." *Id.* at 131-34. A Guidelines system that *increases* racial disparities in sentencing cannot be a benchmark from which only "extraordinary circumstances" warrant materially different outcomes.

Accordingly, the Guidelines should not be followed simply because that would achieve greater uniformity, as the government claims. Not only is uniformity just one of several considerations under Section 3553(a), but rigid adherence to the Guidelines will not advance that objective. In fact, in Kimbrough's case, imposing a *below*-Guidelines sentence reduces unwarranted disparity by treating him like similar low-level offenders.

D. The History Of Amendments To The Guidelines Further Undermines Any Argument For Applying The Rules Employed In The Fourth And Eighth Circuits.

Another reason advanced for requiring proportionally "substantial" circumstances for non-Guidelines sentences is that the Guidelines have been refined over time based on several years of sentencing experience and studies. The history of the Guideline amendment process thoroughly refutes this argument, demonstrating that the amendment process has proven incapable of incorporating Section 3553(a)'s purposes and other sentencing factors into the Guidelines—even though Congress, the Commission, and this Court envisioned such a process, *see Mistretta v. United States*, 488 U.S. 361, 379 (1989); 28 U.S.C. § 994(o).

When the original Commission determined it could not base its Guidelines ranges on a principled application of the statutory purposes of sentencing listed in Section 3553(a)(2), it intended to make up for that shortcoming in later revisions:

(1) incorporating the findings of the Commission's "continuing research, experience, and analysis," *id.* at pt. A(2); and (2) developing a sentencing "common law," whereby judges would "remain free to depart from the Guidelines' categorical sentences," transmitting their reasons for doing so to the Commission, which would then revise the Guidelines to incorporate the common practices of the judiciary. Breyer, 11 Fed. Sent. R. at 183, 185 (the original choices were to be "subject to revision in light of Guideline implementation experience"); *see also Booker*, 543 U.S. at 263.

Experience, however, has not measured up to these aspirations. In fact, the amendments have been notable for their relentless addition of factors that increase offense levels (the cumulative effect of the 696 amendments has been a "one-way upward ratchet" in sentencing),[16] and further restrict the ability of judges to consider, among other things, the history and characteristics of defendants, all without the benefit of studies that tie the increases to the purposes of sentencing.[17]

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[16] Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005). *See also, e.g.*, *Fifteen Year Report* (Sentencing Commission) at 137-38 (discussing the negative impact of "factor creep" on the Commission's efforts to tie offense levels to offense seriousness); Jeffrey S. Parker (Former Deputy Chief Counsel to the Commission) & Michael K. Block (Former Commissioner), *The Limits of Federal Sentencing Policy: Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (noting that the Commission has lapsed into enacting "gratuitous increases in punishment levels that ha[ve] no basis in either principle or practice, and instead [are] essentially political decisions reflecting responses to interest group pressures"); *id.* at 1033-34. Of the nearly 700 amendments to the Guidelines (USSG App. C (2006)), only a handful have operated to decrease the length of some sentences. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)*, 30 Champion 32 at n.39 (2006).

[17] *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 56 (1998) ("Nowhere in the forest of directives that the Commission has promulgated over the last decade can

(footnote continued on next page)

Even criminal history—the single "offender" characteristic accounted for in the Guidelines—does not produce results that can be presumed to reflect the purposes of sentencing or other sentencing factors. Due to "pressing congressional deadlines," the Commission was unable to validate its criminal history measure with its studies. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* ("*Measuring Recidivism Report*") at 1 (2004), *available at* http://www.ussc.gov/publicat/recidivism_general.pdf.

The Commission's analysis, which tested these premises seventeen years later, demonstrates quite compellingly that many of the offender characteristics the Commission has ruled off-limits—age, educational level, employment status, and so on—are indeed strong predictors of recidivism. *See Measuring Recidivism Report* at 16 ("Investigations using the recidivism data suggest that there are several legally permissible offender characteristics which, if incorporated into the criminal history computation, are likely to improve predictive power.").[18] Yet the ranges computed under the Guidelines do not account for any of these offender characteristics.[19] In

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(*footnote continued from previous page*)

one find a discussion of the rationale for the particular approaches or definitions adopted. . .; nor can one find any efforts to justify the particular weights it has elected to assign to various sentencing factors.").

[18] For example, the Commission found that recidivism rates are strongly correlated to age (35.5% for offenders under 21 versus 9.5% for offenders over 50), educational level (31.4% for offenders with less than a high school education versus 8.8% for offenders with a college degree), and employment status (32.4% for offenders who were not steadily employed in the year before their arrest versus 19.6% for offenders who were steadily employed during this period). *Id.* at 12-14.

[19] The problem is magnified by the Commission's initial decision to deviate upward from the "historical averages" for a particular category of defendants—those who had previously received probationary sentences for "certain economic crimes," USSG ch. 1, pt. A(4)(d) (1987)—notwithstanding Congress's directive that the Guidelines "reflect the gen-

(*footnote continued on next page*)

light of these factors, which are not considered in the Guidelines system, the district court in petitioner Gall's case properly considered that his rehabilitation, education, employment, and independent withdrawal from the conspiracy warranted a non-Guidelines sentence.

The development of the sentencing "common law" has also fallen short of expectations, largely because the Commission has consistently acted to remove the district judges' power to take *all* sentencing factors into account. In the early years of Guidelines sentencing, judges did depart from the Guidelines where the ranges did not adequately account for the individualized circumstances of the cases before them, such as military service, civic contributions, charitable activities, and other factors. Instead of taking such feedback into account, the Commission adopted several amendments that discouraged, or outright prohibited, such departures.[20] Thus, as one commentator recently noted, "the idea that feedback

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eral appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C § 994(j). Although the Commission's own findings from the recidivism data support the creation of a "first offender" criminal history category that would help carry out the directive in Section 994(j), *see* U.S. Sentencing Commission, *Recidivism and the "First Offender"* (2004), *available at* http://www.ussc.gov/publicat/Recidivism_First-Offender.pdf, the Guidelines still have not been amended to do so.

[20] *See* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277, 284 & n.33 (2005) (tracing the addition of § 5H1.12, prohibiting departures based on "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," to *United States v. Floyd*, 956 F.2d 203 (9th Cir. 1991)); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 Fed. Probation 45 (1991) (tracing the 1991 addition of § 5H1.11, which discourages the consideration of a defendant's military service, civic contributions, charitable activities, and "other similar prior good works," to *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990), and *United States v. Pipich*, 688 F. Supp. 991 (D. Md. 1988)).

from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guideline range have come to be viewed as illegitimate, even deviant." Frank O. Bowman, III, *Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System after Booker*, 43 Hous. L. Rev. 279, 321 (2006).

E. The Rules Imposed By The Fourth And Eighth Circuits Are Inconsistent With The Standard Of Review Articulated By This Court In *Rita* And *Booker*

To be faithful to the remedy in *Booker,* and in recognition of the fact that the Guidelines have been—and are inherently—unable to incorporate Section 3553(a)'s sentencing purposes and factors, district courts must have the latitude to treat the Guidelines as truly advisory. This includes the power to make a reasoned determination that the Guidelines do not always reflect a proper balance of the statutory considerations, as well as the ability to conclude that for reasons apart from a "heartland" analysis the sentence should not substantially equate with that recommended by the Manual.

As demonstrated above, the Guidelines do not—and cannot—produce sentence ranges that take account of *each* factor and purpose a judge is required by law to consider. As this Court explained in *Rita*, emphasizing the differing roles of the Commission and the judge, this limitation is inherent in any system of Guidelines. In a sentencing proceeding, the factors a judge must consider are numerous, and the interplay of those factors with each other and with the purposes of sentencing is complex. Further complicating matters, many of those factors and purposes cannot be quantified or otherwise converted to a form in which they possess a common denominator. Thus, even if the factual input is accurate, a Guideline computation gives a judge nothing more than the ability to compare a limited number of factors in one case to the same categories of factors in other cases. That computation is in-

herently incapable of producing a benchmark (a presumptively accurate "answer") because such a computation cannot take into account much of the input necessary to the process.

As a result of these limitations, it is entirely appropriate for district judges to inquire whether a Guidelines sentence "fails properly to reflect § 3553(a) considerations[.]" *Rita*, slip op. at 12. Such an analysis encompasses whether "the Guidelines reflect an unsound judgment," or whether they "generally treat certain defendant characteristics in the proper way." *Id.* at 18 (identifying types of sentencing arguments that require judges to provide a more detailed statement of reasons for the sentence imposed). Because certain Section 3553(a) factors as applied to a particular case may be both "ordinary" and unaccounted for in the Guidelines, the rules applied by the Fourth and Eighth Circuits prevent judges from engaging in such an inquiry.

The rules employed in these two cases also fail to afford appropriate deference to district judges, who have an institutional advantage in evaluating the full mix of sentencing factors presented in a particular case. *See Rita*, slip op. at 11 (noting that *Booker* held that "'reasonableness' review merely asks whether the trial court abused its discretion"); *Koon v. United States*, 518 U.S. 81, 98 (1996) (recognizing the district courts' "institutional advantage over appellate courts" in determining how cases compare to one another). Ironically, if the government's version of reasonableness review prevails, judges will have less flexibility than when the guidelines were mandatory. *Koon*, 518 U.S. at 98 (justifying deference because district courts "see so many more Guidelines cases than appellate courts do"). For it was under the mandatory regime that this Court observed, "the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.*; *see also United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir. 1989) ("District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from

the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case.")

In sum, when a district judge's analysis is rationally based on the Section 3553 factors, a sentence other than that recommended by the Guidelines is not unreasonable simply because it is based on a different weighing of those factors. *See Rita*, slip op. at 10 ("different judges (and others) can differ as to how best to reconcile the disparate ends of punishment"). And because judges operating under an advisory Guidelines system may properly conclude that non-extraordinary circumstances pertinent to one or more Section 3553(a) factors warrant a sentence that is materially different from that recommended under Section 3553(a)(4), such a conclusion is not a proper ground for reversal.

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for proceedings consistent with this Court's rulings in *United States v. Booker* and *Rita v. United States*.

Respectfully submitted.

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DERRICK KIMBROUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE SENTENCING PROJECT AND THE CENTER FOR THE STUDY OF RACE AND LAW AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE SENTENCING PROJECT AND THE CENTER FOR THE STUDY OF RACE AND LAW AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Sentencing Project and The Center for the Study of Race and Law at the University of Virginia School of Law submit this brief *amici curiae* in support of the petitioner.[1]

INTEREST OF *AMICI CURIAE*

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on

[1] Pursuant to Rule 37, a blanket letter of consent from the petitioner has been filed with the Clerk of the Court. A letter of consent from the respondent United States authorizing the filing of this brief is also on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of the brief.

issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, and promotes cost-effective and humane responses to crime.

The Sentencing Project has produced a broad range of scholarship assessing the effects of federal crack cocaine policy, and members of its staff have been invited to present testimony before Congress, the United States Sentencing Commission, and professional audiences. Because of its particular expertise and interest in this issue, The Sentencing Project also filed a brief *amici curiae* (jointly with the American Civil Liberties Union) specifically addressing the crack-powder cocaine disparity in *Claiborne v. United States*, 127 S. Ct. 2245 (2007).

* * *

The Center for the Study of Race and Law at the University of Virginia School of Law ("Center")[2] seeks to provide opportunities for students, scholars, practitioners, and community members to examine and exchange ideas related to race and law. The Center coordinates and promotes the substantial array of existing Law School programs on race and law, including courses, public lectures, scholarly workshops, symposia, and informal discussions, and enhances these offerings by sponsoring additional programs, often in partnership with interested student organizations. The Center also offers a concentration of courses on race and law, including 10 core courses and more than 20 related offerings, and serves as a resource for faculty whose teaching or scholarship addresses subjects related to race.

Due to the Center's expertise in race-related scholarship and deep commitment to public service, the Center files this

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[2] The views expressed in the brief are endorsed only by the Center and do not necessarily reflect the views or opinions of the University of Virginia.

amici curiae brief to facilitate more critical and substantive dialogue on laws that have a disparate racial impact and to demonstrate to students how practitioners blend legal theory with contemporary Supreme Court practice.

SUMMARY OF ARGUMENT

The sentence below illustrates why a sentence within the Guidelines range may not be the only reasonable choice in many cases, particularly one involving controlled substances generally and crack cocaine in particular. Unlike the Guidelines ranges chosen for other offenses, such as the perjury offense at issue in *Rita v. United States*, 127 S. Ct. 2456 (2007), ranges for drug offenses (Guidelines Part D) were not even arguably derived using an "empirical approach." The Guidelines thus fail to take account of all the § 3553(a) factors. Instead, the drug Guidelines ranges are driven almost entirely by the type and quantity of the substance involved.

The Commission intended drug type and quantity to approximate the "seriousness of the offense." The crack cocaine illustration demonstrates how this attempt does not always succeed. In fact, *low-level* crack cocaine offenders often receive similar sentences under the Guidelines to *high-level* powder cocaine offenders.

Because many § 3553(a) factors other than the type and quantity of drug may indicate that a shorter sentence is warranted in an individual drug case, sentencing courts may reasonably impose below-Guidelines sentences, as did the district court below. In order to carry out the statutory mandate, sentencing judges must be allowed to—indeed, should be required to—consider all relevant information, including reports of the Sentencing Commission when they are pertinent to the sentencing decision at issue. In particular, when making sentencing decisions in cases involving crack cocaine, such reports and other expert opinion may prove particularly helpful given the fact that two decades of

experience have yielded an enormous database of information undermining any argument for a 100:1 crack-powder ratio.

Here, the district court properly considered only relevant information and imposed a reasonable sentence reflecting all of the relevant § 3553(a) factors. Mr. Kimbrough's sentence—well in excess of the sentence to which he would have been subjected had the cocaine in which he was found to be in possession not been cooked into crack—more than satisfied each of the criteria and was sufficient to satisfy the needs of just punishment.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS VIOLATES *BOOKER* AND *RITA* BY ELEVATING THE GUIDELINES ABOVE OTHER RELEVANT SENTENCING FACTORS.

A. *Rita* Holds That The Guidelines Embody A Rough Approximation Of Section 3553(a) Because Of The "Empirical Approach" Used In Their Creation.

This Court has made clear that 18 U.S.C. § 3553(a) must be the touchstone of every federal sentencing decision. *See United States v. Booker*, 543 U.S. at 220, 268-69 (2005); *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007); *see also id.* at 2468 (noting that a defendant may "contest[] the Guidelines sentence . . . under § 3553(a)"). District courts must weigh all of the § 3553(a) factors to arrive at a proper sentence. *Rita*, 127 S. Ct. at 2463. Although this Court held in *Rita* that appellate courts may employ a presumption of reasonableness when reviewing a within-Guidelines sentence, that is only because the "empirical approach"[3] utilized by the original

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[3] As noted in *Rita*, the Sentencing Commission created most of the Guidelines ranges by consulting 10,000 presentence reports to determine the base offense level for each crime and the corresponding sentencing ranges within which a judge could sentence. 127 S. Ct. at 2464; *see also* U.S. Sentencing Guidelines Manual, ch. 1, pt. A, introductory cmt. (1987).

Sentencing Commission, *id.* at 2464, resulted in sentencing ranges that "seek to embody the § 3553(a) considerations, both in principle and practice," *id.* at 2458. As the *Rita* Court described it, the Commission "tried to embody in the Guidelines the factors and considerations set forth in § 3553(a)." *Id.* at 2463. In order to do so, "the Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Id.* at 2464. Thus, the Court concluded, this empirical approach created Guidelines that "insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Id.* at 2458.

B. The Drug Guidelines Are Not The Result Of An "Empirical Approach" And Do Not Embody The Section 3553(a) Factors.

1. While *Rita*'s description of the "empirical approach" used by the Commission may be accurate for some of the Guidelines,[4] it does not accurately describe the Guidelines for

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The 10,000 presentence reports helped identify "a list of relevant distinctions" that reflected those factors which "make a significant difference in sentencing decisions." *Id.* at ch. 1, pt. A. int. cmt.

[4] This brief focuses entirely on the drug Guidelines, which for all the reasons expressed herein were neither derived using an "empirical approach," as the Court described it in *Rita*, nor embody all of the § 3553(a) factors. To what extent other Guidelines similarly were not derived "empirically" is beyond the scope of the brief. We note, however, that the first Commission created sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," including, in addition to drug offenses, white collar offenses, robbery, murder, aggravated assault, immigration and rape, and that this deviation from past practice has continued up to the present, with the result that, as of 2002, federal offenders spent twice as long in prison as they did in 1984. United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 47, 53-54, 64, 67, 139 (2004), *available at*

drug offenses. *See, e.g.*, Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1059-62 (2001) (describing different approaches taken by the Sentencing Commission "[i]n setting sentencing levels for most non-drug offenses" versus sentencing levels for "drug crimes"). Because the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, went into effect after the Commission had finished its collection of empirical data on sentencing practices, the Commission did not rely on the drug sentencing data, all of which related to the previous drug laws. Instead, the Commission felt it was "necessary to project the impact of this new law" and created much harsher sentences for drug crimes than would have been derived by an empirical model looking at past sentencing practices. U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 58 (1987).

As a result, the Commission established base-offense levels for drug offenses that "are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute [*i.e.*, the quantities tied to the mandatory minimums]." U.S. Sentencing Guidelines Manual, § 2D1.1 cmt. background (1988). Rather than reflecting the myriad sentencing factors that would have been taken into account by past sentencing judges imposing actual sentences, "[t]he drug guidelines . . . are driven largely by drug quantity. The baseline sentence (base offense level) is determined by the type and amount of the controlled substance involved." William W. Wilkins, Jr., et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 Wake Forest L. Rev. 305, 314 (1993); *see also* Kyle O'Dowd, *The Need to Re-assess Quantity-Based Drug Sentences*, 12 Fed. Sent'g. R. 116, 116 (1999) (noting that the drug Guidelines "directly utilize and

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http://www.ussc.gov/15_year/15year.htm [hereinafter "U.S.S.C., *Fifteen Years*"].

incorporate the drug quantity thresholds from the mandatory minimum statutes as anchors for drug sentencing calculations" and "extrapolate sentences above and below these mandatory minimum sentences by also relying on drug quantities as the central determinate of offense severity").

2. Because of the approach used to create them, the drug Guidelines do not even remotely take account of all the § 3553(a) factors. By focusing almost exclusively on drug quantity and type, the Guidelines follow the example of the Anti-Drug Abuse Act of 1986 and attempt to tie every sentence to a single factor: the seriousness of the offense as measured solely by quantity and type of drug.

The 1986 Act created a two-tier framework of penalties focused on targeting "major" and "serious" drug offenders; the ten-year mandatory minimum was designed for "major traffickers" and the five-year mandatory minimum for "serious traffickers."[5] H.R. Rep. No. 99-845, pt. 1, at 16-18. *See also id.* at 11-12 ("The Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs," with a "second level of focus" on the "serious traffickers . . . [who] keep the street markets going."); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252-53 (1996) ("The decision to distinguish crack from powder [in the Act] coincided with the decision to punish 'serious' and 'major' traffickers more severely than others . . . . 'Serious' and 'major' drug traffickers were identified according to the amount of drugs with which they were apprehended."). Penalties for each of these categories are established based on the quantity of drugs

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[5] A "major trafficker" is defined as someone who operates a manufacturing or distribution network, and a "serious trafficker" as someone who manages "retail level traffic" in "substantial street quantities." H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).

involved (depending on the type of drug), reflecting the notion that high-level offenders can be identified simply by reference to the particular quantity of drugs in their possession. *See, e.g.*, 132 Cong. Rec. S14301 (daily ed. Sept. 30, 1986) (statement of Sen. Byrd) ("[T]he kingpins—the masterminds who are really running these operations—. . . can be identified by the amount of drugs with which they are involved."); H.R. Rep. No. 99-845, pt. 1, at 12 ("After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level.").[6]

Section 3553(a) mandates that sentencing judges "impose a sentence that is sufficient but not greater than necessary" to satisfy the needs of just punishment in light of the seriousness of the offense, deterrence, incapacitation, and rehabilitation. In selecting a particular sentence, a judge must consider: the history and characteristics of the defendant and the circumstances of the offense (including mitigating history, characteristics, and circumstances), the purposes just described and the "kinds of sentences available" (*i.e.*, the statutory maximum and minimums, if any, as opposed to the kinds of sentences recommended by the Guidelines), the Guidelines range, the policy statements, the need to avoid unwarranted disparities among defendants with similar records convicted of similar conduct (not the need to avoid sentences different from the Guidelines range), and the need to provide restitution to victims, if any. 18 U.S.C. § 3553(a); *see also Booker*, 543 U.S. at 268-69 (describing § 3553(a)).

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[6] In fact, the bill to which this testimony refers would have imposed 10-year minimums for 5 kilograms of powder cocaine and 100 grams of crack (as opposed to the 50 grams eventually enacted) and five-year minimums for 1 kilogram of powder cocaine and 20 grams of crack (as opposed to the 5 grams ultimately enacted), a 50:1 ratio).

The drug Guidelines do not, as discussed above, take into account most of these factors. By relying on drug quantity alone to generate Guidelines ranges, the Guidelines attempt to create a sentencing scheme that approximates the seriousness of the offense. But that factor alone dominates the scheme to the exclusion of every other statutorily mandated consideration, as the district court below explicitly recognized in expounding upon the reasons for imposing a below-Guidelines sentence:

> The sentencing guidelines as calculated exclude[] consideration of a number of factors that 3553(a) tells the Court that the Court should consider.
>
> The sentencing guidelines do not consider . . . the history and characteristics of the defendant. The sentencing guidelines do not consider the education and vocational skills of the defendant. It does not look at family ties and background. It does not look at military contributions. It excludes all of those. Yet the sentencing factors other than the guidelines say[] the Court should consider those.

J.A. 73.

C. The Drug Guidelines Do Not Always Accurately Reflect The Seriousness Of The Underlying Offense.

1. Indeed, because drug quantity and drug type do not always correlate to an individual defendant's culpability, or to the seriousness of the underlying offense, the Guidelines fail to reflect even the § 3553(a) "seriousness" factor in many cases. Crack cocaine is the classic example of how Congress failed to achieve its goal of targeting the most serious offenders through the simplistic method of tying penalties to drug type and quantity.

The congressional goal of targeting the most serious offenders was clearly among the most significant reasons underlying the 100:1 crack-powder ratio used in the 1986 Act to set mandatory minimum penalties for those substances.[7] Congress created the 100:1 ratio based on the perception that "because crack is so potent, drug dealers need to carry much smaller quantities of crack than of cocaine powder" to provide drug users with the same doses. 132 Cong. Rec. S8091 (daily ed. June 20, 1986) (statement of Sen. D'Amato). In addition, crack cocaine, more than any other drug, was considered to be correlated with other serious crimes. *See* United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 118-19 (1995), *available at* http://www.ussc.gov/crack/exec.htm [hereinafter "U.S.S.C., *1995 Special Report*"] (observing that "the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs").

Historically, *low*-level crack cocaine *users* have received sentences similar to (and often higher than) *high*-level powder cocaine *importers*—the very suppliers who provide the powder cocaine that ultimately produces crack cocaine. *See* United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 63 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm

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[7] For this reason, the smaller quantity of crack cocaine drove the sentence received by Mr. Kimbrough. The Guidelines range of 168-210, J.A. 50-51 & n.1, would have been the same had he been captured with the same quantity of crack cocaine and no powder at all. *See* U.S. Sentencing Guidelines ch. 5, pt. A, sent. chart (2004) (imposing a sentence of 168-210 months for a criminal category history category II offender with an offense level of 34, based on 50 grams or more of crack cocaine plus a weapon). And, if all the cocaine had been powder cocaine, his sentence would have been only 37-46 months under the Guidelines. *Id.* (imposing a sentence of 37-46 months for a criminal history category II offender with an offense level of 20 based on 100-200 grams of powder cocaine plus a weapon).

[hereinafter "U.S.S.C., *2002 Report*"] (average sentence of lowest-level crack cocaine offenders was 104 months); *id.* at 43, 45 (average sentence of highest-level powder cocaine traffickers was 101 months).[8] Viewed on a gram-by-gram basis, street level crack dealers are punished 300 times more severely than high-level cocaine powder importers. Eric E. Sterling, *Getting Justice Off Its Junk Food Diet*, White Paper (July 17, 2006), at 4, *available at* http://www.cjpf.org/Getting_Justice_Off_Its_Junk_Food_Diet.pdf. Crack defendants also have the longest average period of incarceration of *any* drug offender—approximately 120 months. United States Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (2006), Fig. L, *available at* http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm [hereinafter "U.S.S.C., *Sourcebook*"].

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[8] The recently released Commission Report indicates that low-level crack offenders have, over the most recent five-year period, received somewhat lower sentences than high-level powder cocaine offenders. *See* United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 30 (2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf [hereinafter "U.S.S.C., *2007 Report*"]. While it is encouraging that the lowest-level crack offenders were not punished more severely (on average) than their higher-level superiors (who supply the powder that is cooked into crack cocaine) between 2000 and 2005, the sentences for these categories of powder and crack offenders remain discouragingly similar, and fail to meaningfully distinguish between the serious offenders Congress intended to target and the low-level offenders it did not. In addition, even the new data demonstrates that crack cocaine wholesalers receive higher sentences than the highest-level powder cocaine offenders. *Id.* It is also discouraging that, over the most recent five-year period, "[i]n contrast to powder cocaine [offenders, who were more often in high-level functions than in the previous sample], crack cocaine offenders continue to cluster only in the street-level dealer category." *Id.* at 21.

It is also not clear that this small five-year snapshot showing a move toward more rational sentencing (or, at least, a less irrational system) will remain the trend, although a decision by this Court affirming Mr. Kimbrough's sentence would certainly encourage it.

In a Special Report to Congress in 1995, the Commission used the facts of an actual federal case to illustrate the impact of the 100:1 ratio in practice. In its illustration, two crack defendants purchased 255 grams of powder cocaine from their higher-level supplier and cooked it, yielding 88 grams of crack cocaine they intended to distribute. The higher-level powder supplier was subject to a Guidelines range of 33 to 41 months for selling 255 grams of power, whereas the crack defendants were each subject to a range of 121 to 151 months for buying a portion of the supplier's powder and cooking it. In addition, the crack defendants faced ten-year mandatory minimums, while the supplier was not subject to any mandatory minimum. *See* U.S.S.C., *1995 Special Report*, *supra*, at 174.

Two decades of experience have shown that the 100:1 ratio has resulted in a disproportionate number of low-level offenders being prosecuted for crack offenses. In 2000, barely one in five crack cocaine defendants met the criteria of a "major" or "serious" trafficker. *See* U.S.S.C., *2002 Report*, *supra*, at 39 (noting that, in 2000, approximately 73% of convicted crack cocaine offenders were "street-level" dealers, users, and the like, while only about 21% of defendants were mid-level offenders, such as importers, suppliers, or managers, and less than 6% were the highest-level offenders). This state of affairs is the very antithesis of what Congress had in mind in establishing the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

In fact, none of the original justifications for the 100:1 ratio have survived two decades' worth of careful scrutiny. "More recent data indicate that significantly less trafficking-related violence or systemic violence . . . is associated with crack cocaine trafficking offenses than previously assumed." U.S.S.C., *2002 Report*, *supra*, at 100. This continues to be the case: in fact, "the prevalence of violence decreased [between 2000 and 2005] . . . continuing a trend identified in the 2002

Commission Report, [and] continues to occur in only a minority of offenses." U.S.S.C., *2007 Report*, *supra*, at 36; *id.* at 37 (percentage of crack offenses categorized as "violent" only 10.4%); *id.* at 33 (in 2005, only 2.9% of crack cocaine offenders used a weapon); *see also* United States Sentencing Comm'n, Transcript of Public Hearing on Cocaine Sentencing Policy 226-27 (Nov. 14, 2006), *available at* http://www.ussc.gov/hearings/11_15_06/testimony.pdf [hereinafter "U.S.S.C., 2006 Public Hearing Tr."] (Test. of Profs. Jonathan Caulkins & Peter Reuter) (crack cocaine violence has declined over time because the average age of crack users has increased).[9] And that is to say nothing of the problem we have already identified, namely that the 100:1 ratio can result in lengthier sentences for low-level crack users than for the very high-level powder cocaine dealers who supply the drugs needed to convert powder cocaine into crack cocaine.

Nor can the 100:1 ratio be sustained based on the other oft-cited justification: the false perception that there are tangible differences between the two substances. *See, e.g.*, 132 Cong. Rec. 26447 (1986) (statement of Sen. Chiles) (stating that disparate "treatment is absolutely essential because of the especially lethal characteristics of this [crack] form of cocaine"). The Director of the National Institute on Drug Abuse, a division of the U.S. Department of Health & Human Services, recently debunked that myth by testifying that "the pharmacological effects of cocaine are the same, regardless of whether it is in the form of cocaine hydrochloride [powder] or crack cocaine, the base." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 166 (Test. of Dr. Nora D.

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[9] In any event, district courts will, of course, impose higher penalties in cases involving violence, regardless of the type of drug at issue in the underlying offense. *See, e.g.*, U.S. Sentencing Guidelines §§ 2D1.1(b)(1), 2K2.1(b)(6) (weapons enhancements).

Volkow, Director, Nat'l Inst. on Drug Abuse, Nat'l Institutes of Health, U.S. Dept. of Health & Human Servs.).[10]

2. Because of this failure to achieve its original goals, the Commission has urged Congress to eliminate the 100:1 ratio pursuant to its statutory duty to monitor the operation of the Guidelines and federal sentencing system and to propose amendments to Congress for appropriate modifications, *see* 28 U.S.C. § 994.

In 1995, the Commission released a report concluding that congressional objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on a federal sentencing scheme that includes the 100:1 quantity ratio. *See* U.S.S.C., *1995 Special Report*, *supra*, at 198-200. In reaching this conclusion, the Commission noted that the ratio punishes low-level crack offenders more harshly than wholesale powder distributors. *See id.* at 150-51. The Commission also cited the disproportionate impact of the policy on African-American defendants. *See id.* at 192.

In 1997, the Commission returned to Congress with a report once again recommending a modification to the 100:1

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[10] The Sentencing Commission has likewise noted that the differential treatment cannot be justified based upon this alleged difference. *See* U.S.S.C., *Fifteen Years*, *supra*, at 132. The Commission noted in particular that:

> [T]he harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. . . . Powder cocaine that is smoked is equally addictive as crack cocaine, and powder cocaine that is injected is more harmful and more addictive than crack cocaine . . . . Recent research has demonstrated that some of the worst harms thought to be associated with crack cocaine use, such as disabilities associated with pre-natal cocaine exposure, are not as severe as initially feared and no more serious from crack cocaine exposure than from powder cocaine exposure.

Id.

ratio. *See* United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF; *see also id.* at 9 ("[A]s the Commission reported in 1995, we again unanimously conclude that congressional objectives can be achieved more effectively without relying on the current federal sentencing scheme for cocaine offenses that includes the 100-to-1 quantity ratio."). This time, the Commission focused on the incongruity of crack cocaine sentences when measured against the harm to society from the use and sale of the drug. *See id.* at 9. Specifically, the Commission stated that, in its view, "federal sentencing policy should reflect federal priorities by targeting the most serious offenders in order to curb . . . drug trafficking and violent crime," and noted that "current federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year minimum penalty for crack cocaine too low." *Id.* at 7.[11]

Even more recently, the Commission has reiterated its position, having specifically singled out the crack-powder disparity as a category having an "adverse [racial] impact," U.S.S.C., *Fifteen Years*, *supra*, at 131. Accordingly, the Commission concluded, "[r]evising the crack cocaine thresholds would . . . dramatically improve the fairness of the

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[11] Shortly before certiorari was granted, the Commission released its most recent report. Reiterating its positions from the past Reports described above, the Commission has revised the crack Guideline ranges, a change that will go into effect in November 2007 assuming that Congress does not reject the proposal. *See* 28 U.S.C. § 994. While the new Guidelines are somewhat less harsh than the version at issue here, such that § 3553(a) factors may indicate that a within-Guidelines sentence is warranted in a somewhat higher percentage of cases than formerly, the new Guidelines are unlikely to have a significant impact, in large part because they are still tied to quantity and type (which remain, even with the modifications an inapt approximation of seriousness in crack cases) and do not embody other relevant statutory factors.

federal sentencing system." *Id.* at 132. The Commission's concern stems from its central mission, as articulated by the relevant enabling statutes. Section 991(b)(1)(B) of Title 28, for example, mandates that the Commission "provide certainty and fairness in meeting the purposes of sentencing, avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[12]

3. Just as the Commission has made a "wholesale" judgment excoriating the crack-powder disparity, so too have district courts been making similar judgments in practice at the "retail" level. *Cf. Rita*, 127 S. Ct. at 2488 ("The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale."). Just as did the district court below, other federal courts have concluded that the Guidelines range may often be inappropriate in crack cocaine cases.

In *United States v. Fisher*, for example, the district court determined that the Guidelines range applicable to a crack cocaine defendant "substantially overstat[ed] the seriousness of the offense" following an analysis that discussed past criticisms of the 100:1 ratio. 451 F. Supp. 2d 553, 560-65

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[12] Although Congress has acknowledged the criticism of the 100:1 powder-to-crack ratio in asking the Commission to make recommendations regarding whether it should eliminate or reduce the disparity, it has failed to act on the Commission's repeated recommendations. *See, e.g.*, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (1995) (rejecting Commission's recommendations); *see also United States v. Pho*, 433 F.3d 53, 56 (1st Cir. 2006) (reporting congressional inaction in face of Commission's recommendations since 1995).

(S.D.N.Y. 2005).[13] As another district court summed up, "[t]he growing sentiment in the district courts is clear" that the 100:1 ratio "cannot withstand . . . scrutiny" under § 3553(a). *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005).[14]

Likewise, several appellate judges have made the point that, following *Booker*'s mandate that judges consider all of the factors listed under § 3553(a), "a sentencing court is not only *permitted* but is *required* to evaluate the propriety of applying the 100:1 crack-cocaine ratio in a particular case." *United States v. Williams*, 472 F.3d 835, 848 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing *en banc*) (emphases in original). As another judge specifically noted, the Commission's findings with respect to the effects of the 100:1 ratio "can help sentencing courts analyze the § 3553(a) factors . . . . The Commission's findings, in other words, can be considered insofar as they are *refracted through* an individual defendant's case." *United States v. Eura*, 440 F.3d 625, 637 (4th Cir. 2006) (Michael, J., concurring) (emphasis in original); *see also United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) ("district courts may consider the crack/powder cocaine differential in the Guidelines as a

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[13] The Second Circuit has recently concluded that it may not adopt a weight ratio other than the 100:1 ratio prescribed by Congress, and expressly mentioned both the *Fisher* and *Perry* district court opinions (discussed above) as having indicated disagreement with the ratio. *See United States v. Castillo*, 460 F.3d 337, 352-53 (2d Cir. 2006). The court nonetheless expressly noted that it "[d]id not express any opinion on the reasonableness of [either] of those sentences in light of the specific facts involved in those cases." *Id.* at 353 n.4.

[14] In fact, a substantial number of district courts have issued opinions with similarly explicit discussions since *Booker*. *See, e.g.*, *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243 (E.D. Tenn. May 6, 2005); *United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

factor, but not a mandate, in the post-*Booker* sentencing process").

District courts have struggled against strictures imposed on them that prevent them from taking the well-known crack realities into account. As one judge asked on remand, after being reversed by the Eleventh Circuit,

> So what am I to do? . . . Am I to (somehow) ignore the widely held belief that the crack-powder disparity is inherently unjust; or may I subconsciously consider it in relationship to the offense conduct so long as it does not overwhelm my subjective judgment? . . . Should I . . . subvert my own sense of justice in order to purify my consideration of the statutory factors? Is that even humanly possible?

United States v. Williams, 481 F. Supp. 2d 1298, 1302 (M.D. Fla. 2007). Similarly, another judge on remand acknowledged he could no longer figure the crack-powder distinction into his analysis, but he concluded that "just as an 87-month sentence was determined to be sufficient but not greater than necessary to comply with § 3553(a)(2) in May 2005, so it still is today." *United States v. Castillo*, No. 03 CR 835 (RWS), 2007 U.S. Dist. LEXIS 7422, at *23 (S.D.N.Y. Jan. 25, 2007).[15]

For the many reasons these judges have articulated, below-Guidelines range sentences may be—indeed, often *will*

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[15] Judge Sweet altered the sentence a month later to "comply with the Second Circuit's opinion," extending it to 111 months, but only after noting that his initial determination that "an 87-month sentence was sufficient but not greater than necessary to comply with § 3553(a)(2)" "still holds." *United States v. Castillo*, No. 03 CR 835(RWS), 2007 WL 582749, at *8 (S.D.N.Y. Feb. 26, 2007).

be—the only reasonable and just choice in many crack cocaine cases following *Booker*.

4. Requiring sentences that actually reflect the seriousness of the underlying offense may have the beneficial side effect of refocusing congressional objectives. While Congress intended the 1986 Act to "give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources," H.R. Rep. No. 99-845, pt. 1, at 11, the prosecution of crack offenders has followed precisely the opposite course over time, *see* U.S.S.C., 2006 Public Hearing Tr., *supra*, at 40-41 (Test. of Joseph Rannazzisi, Drug Enforcement Administration) (describing small-scale nature of crack cocaine operations generally and specifically noting that most operations involve only small numbers of ounces). Crack prosecutions generally involve low-level and non-violent offenders—often first-time offenders—yet also generally result in long prison sentences.[16] These prosecutions have therefore turned federal drug policy on its head. After all, "*every* federal case against a street-level or local trafficker—who could be investigated and prosecuted by state and local law enforcement agencies—is a distraction from the critical federal role and a waste of federal resources." Sterling, *supra*, at 3. As Eric E. Sterling, former assistant counsel to the House Judiciary Committee and current President of the Criminal Justice Policy Foundation, has

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[16] It is not uncommon today for federal law enforcement to insist that low-level suppliers convert powder cocaine into crack in order to set the stage for prosecution of cases involving potentially draconian crack sentences. *See, e.g.*, *United States v. Fontes*, 415 F.3d 174, 177-78 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant brought for sale and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [to produce an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with [defendant's] prior drug sales), the base criminal offense level would have been only 14 . . . .").

noted, "[t]he organizers of [the international drug trade] are virtually immune from investigation by county sheriffs, municipal police departments, or state narcotics bureaus. If the Department of Justice, the Department of Homeland Security and the Department of the Treasury are not focused primarily on those international and national cases—*and they have not been*—then those cases are not being brought." *Id.* (emphasis in original).

Equally as troubling as the fact that federal prosecutors are focusing undue resources on low-level offenses is the fact that they are inappropriately federalizing what is properly the domain of the states: the prosecution of low-level and intrastate drug offenders. In doing so, they are also imposing a federal judgment that is inconsistent with that of all 50 states (as well as the District of Columbia). *See* U.S.S.C., *2007 Report*, *supra*, at 99 (noting that the lone state (Iowa) that formerly used the same extreme 100:1 crack-powder ratio employed by the federal system abolished use of the ratio in 2006 and replaced it with a 10:1 ratio). Indeed, the Commission recently noted that that only thirteen states maintain *any* "form of distinction between crack cocaine and powder cocaine in their penalty schemes." *Id.* at 98.[17] And even those states use considerably smaller differential ratios to distinguish between crack cocaine and powder cocaine offenders. *See id.* at 105-06 (summarizes ratios which range from 2:1 to 75:1, with most of these set at 10:1 or less and only two states greater than 28:1).

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[17] South Carolina, one of the 13 states that distinguishes between crack and powder cocaine offenses, sometimes treats crack offenders more harshly than powder offenders and other times does the opposite. For example, a first-time crack cocaine offender has a higher statutory maximum penalty than a first-time powder cocaine offender, while a second-time powder cocaine offender is penalized more severely (5 to 30 years' imprisonment) than a second-time crack cocaine offender (0 to 25 years' imprisonment). *See* U.S.S.C., *2007 Report*, *supra*, at 103-04.

The instant case is a perfect example. The Eastern District of Virginia, the district in which the case was prosecuted, has the largest number of small-quantity crack cases in the country. *See* U.S.S.C., *2007 Report*, *supra*, at 112-13 tbl. 5-3 (showing that the E.D. Va. has the highest number of crack cocaine cases involving less than 25 grams). Small-quantity cases comprise nearly 40% of the crack cocaine caseload in this district.[18] This is entirely consistent with the federal docket generally. Of all federal crack cocaine prosecutions in fiscal year 2006, 35.1% involved small quantities of crack (less than 25 grams). *Id.* The instant case involved quantities barely large enough to trigger the mandatory minimum under federal law. Had it been prosecuted under state law, the amounts involved would not have triggered a mandatory minimum sentence, and a mere 2:1 crack-powder ratio would have applied. *See id.* at 106 tbl. 5-1.

Disproportionate crack prison sentences like Mr. Kimbrough's have also had a devastating impact not only on low-level offenders, but on their families and communities, particularly in poor urban areas. The racial disparity created by the 100:1 ratio "undermine[s] public confidence in the federal courts." U.S.S.C., *Fifteen Years*, *supra*, at 131; *see also* U.S.S.C., 2006 Public Hearing Tr., *supra*, at 106 (Test. of Judge Reggie Walton) ("I frequently will go over to my old court, the local court here in Washington, and have lunch with my former colleagues, and they express concerns about the disparity that exists in the federal system, that's having a spill-over effect in the local system even though they don't have a disparity, because people in the community are astute enough to know about the disparity, and they bring concerns into the courtroom as potential jurors and, as a result of that, many

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[18] This percentage comports with the focus on low-level crack offenders. In most federal districts, more than a third of crack prosecutions involve less than 25 grams of crack. *See* U.S.S.C., *2007 Report*, *supra*, at 112-13 tbl. 5-3.

times will say they can't serve as jurors . . . ."). Additionally, as one commentator recently noted, the federal policy of "stringent crack sentencing has not abated or reduced cocaine trafficking, nor improved the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders . . . ." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (Test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center).

Tragically, a vastly disproportionate number of those incarcerated low-level drug offenders are African-American (as is Mr. Kimbrough).[19] "The number of black federal crack defendants is ten times the number of white defendants." Sterling, *supra*, at 1. "In 2002, 81 percent of the offenders sentenced for trafficking the crack form of cocaine were African American." U.S.S.C., *Fifteen Years*, *supra*, at 131.[20] As a result, crack cocaine penalties help explain the enormous racial gap in sentences being served by black and white inmates in the federal penal system. Raising the crack cocaine threshold from 5 grams to 25 grams alone would "reduce the gap in average prison sentences between Black

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[19] As of 2005, one in twelve African-American men in their late twenties was incarcerated. *See* Paige M. Harrison & Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics, at 8 (2006). In addition, if current trends continue, one in three black males born today will spend some portion of his adult life incarcerated in a state or federal prison. *See* Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, Bureau of Justice Statistics, at 8 (2003). "[T]he black community as a whole suffers a comparative disadvantage when many of its young men spend their formative years behind bars . . . ." Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. Tol. L. Rev. 215, 231 (1994).

[20] The strong racial correlation of federal crack defendants exists despite the fact that "whites comprise a majority of crack users." Marc Mauer, *Race to Incarcerate* 172 (2d ed. 2006).

and White offenders by 9.2 months." *Id.* at 132. The existing problem is so severe that commentators have labeled the federal crack cocaine disparity the "new Jim Crow" law. Tr. of "Social Justice and the War on Drugs" (morning panel II) (Oct. 4, 2000) (statements of Hon. Robert Sweet and former Baltimore mayor Kurt Schmoke), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html.

The costs of draconian crack sentences are borne not only by "deteriorating neighborhoods" but by taxpayers forced to shoulder the bill for offenders serving "inordinately lengthy sentences at an enormous cost." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (Test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center). Lengthy sentences for low-level, first-time offenders contribute substantially to the growing federal prison overcrowding problem. *See* Marc Mauer, *Race to Incarcerate* 167-69, 172 (2d ed. 2006) (documenting rise in number of prisoners and particularly those incarcerated for drug offenses); *see also id.* at 162 ("[L]aw enforcement is more likely to target cocaine users or crack cocaine users.").[21]

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[21] Furthermore, in terms of the risk of recidivism, "[t]he folly of using expensive prison space for drug offenders, even traffickers, has been documented in research conducted on the federal prison population." Mauer, *supra*, at 172. Using data that showed the recidivism rates for a comparable group of offenders released from prison in 1987, the study showed that "only 19 percent of the low-risk drug traffickers [*i.e.*, more than 30 percent of the total federal drug prisoner population] were re-arrested during the three years after release, and that none of those arrested were charged with serious crimes of violence." *Id.* at 172-73.

D. Because The Drug Guidelines In General And The Crack Guidelines In Particular Do Not Embody The Section 3553(a) Factors, Sentencing Judges Need Not Provide Special Justifications For Imposing Below-Guidelines Sentences In Such Cases.

1. Section 3553(a), not the Guidelines, is the starting and ending point for sentencing judges. Pursuant to this Court's decision in *Booker*, sentencing courts may consider Guidelines ranges, but they are now non-binding and are but one factor among many: courts are instructed to consider all of the § 3553(a) factors and "tailor the sentence" according to these statutory considerations. *Booker*, 543 U.S. at 245. After *Booker*, as one court recently put it, sentencing judges are "to evaluate how well the applicable Guideline effectuates the purposes of sentencing enumerated in § 3553(a)" without affording the Guidelines undue weight. *United States v. Pickett*, 475 F.3d 1347, 1353 (D.C. Cir. 2007).

Sentencing courts fulfill their statutory duty in the usual manner, without any special requirements. *See, e.g.*, *Rita*, 127 S. Ct. at 2468 (no special or long statement required from judge in making sentencing decision). Just as any court may consider relevant and helpful sources in rendering a judicial opinion, sentencing judges may consider—indeed, should consider—any and all helpful sources of information presented to them. Reports of the Sentencing Commission may be helpful in certain cases. In cases involving crack cocaine, a subject on which the Commission has released thousands of pages of expert conclusions, they may prove particularly pertinent.[22]

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[22] In other contexts, of course, other types of data and sources may be pertinent. This brief focuses on Commission reports because they are a particularly helpful source of information in the crack cocaine context to which this brief is addressed (and which the courts below were focused given the nature of this case).

Indeed, in any given drug case, the Guidelines may prove to be of limited assistance to a district judge attempting to balance all of the relevant statutory factors. Sentencing courts fulfill the statutory mandate to impose fair and consistent sentences by evaluating the actual threat posed by the individual defendant. By emphasizing only one aspect of the underlying offenses and their attendant circumstances, the Guidelines ranges failed to embody the statutory factors that were required to be taken into account, or the statutory mandate that a sentence be "sufficient but not greater than necessary" to satisfy the needs of just punishment. While the shorthand of using drug quantity and drug type may work in some cases to ensure that more dangerous and higher-level drug criminals should receive longer sentences, these proxies do not work in every case.

Allowing district courts to render sentences with regard only to the relevant § 3553(a) factors may enable the Sentencing Commission to create new drug Guidelines using the same empirical approach described approvingly by this Court in *Rita*. As this Court noted, "The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita*, 127 S. Ct. at 2464. Were the Commission able to collect data in which district courts acted as dutifully and painstakingly as the judges did below, it would be an easy task to create a rational and uniform scheme of sentencing ranges that truly embodied all of the statutory factors the Commission was ordered to take into account in drug cases, as in others.

2. Nor is there any reason to fear that the *Booker* standard, properly employed, confers unlimited discretion on sentencing judges. Courts still must weigh all the factors and arrive at a sentence that is reasonable in light of them. Moreover, many federal statutes contain mandatory minimums, and in such cases judges will have a starting point

they cannot go below. *See, e.g.*, 12 U.S.C. § 630 (minimum of 2 years' imprisonment for embezzlement, fraud, or false entries by a bank officer); 18 U.S.C. § 225 (minimum of ten years' imprisonment for organizing, managing, or supervising a continuing financial crimes enterprise); 18 U.S.C. § 2251(d) (minimum of five years' imprisonment for a second offense of sexually exploiting a minor). *Cf. Harris v. United States*, 536 U.S. 545, 557 (2002) (upholding judicial fact-finding that increased statutory minimum sentence).

In crack cocaine cases, in particular, unless and until Congress revisits the current mandatory minimum regime of 5 (and 10) years for 5 (and 50) grams of crack, minimum sentences will be triggered in approximately 80% of all crack cocaine cases, just as it was here. *See* U.S.S.C., *Sourcebook*, *supra*, tbl. 43, *available at* http://www.ussc.gov/ANNRPT/2006/table43.pdf. At the same time, however, many crack cases will involve facts like the ones at issue here (or other fact patterns equally deserving of lighter sentences than the Guidelines range would permit). As noted above, not only was Mr. Kimbrough found to be in possession of roughly twice as much powder cocaine as crack (a fact which had no relevance to his sentence), but Mr. Kimbrough had only a minor criminal record, involving misdemeanors, prior to his arrest in the instant case, as well as an admirable and notable military and work history. Accordingly, as the district court judge noted, evaluating his offense from the vantage point of experience, "the crack cocaine involved in this case does in fact exaggerate the advisory sentencing guideline involved in this case." J.A. 74; *see also id.* ("the Court believes that should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case").

E. The Sentence Imposed By The District Court Was Not Unreasonable.

Courts simply are not doing the job with which they were entrusted by Congress following *Booker* when they adhere blindly to Guidelines that fail to reflect an offender's actual culpability. Yet, when they are reversed for not following the Guidelines, as occurred here, they are apt to think twice about fulfilling their statutory duty the next time. This case provides the perfect vehicle for this Court to send a message to the courts of appeals. The district court did precisely what it was supposed to do and should be lauded not lambasted.

After listening carefully to arguments by both the defendant and the government, the district court carefully explained that it understood that it was

> required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective way.

J.A. 72. After this summary of the relevant statutory factors, the court noted further that it was "required to consider factors other than what the sentencing guidelines recommend." *Id.* Moreover, given the nature of the offense, "[t]he sentencing guidelines as calculated exclude[] consideration of a number of factors that 3553(a) tells the Court" to consider. *Id.*

> The sentencing guidelines do not consider . . . the history and characteristics of the defendant. The sentencing guidelines do not consider the education and vocational skills of the defendant. It does not look at family ties and background. It

> does not look at military contributions. It excludes all of those. Yet the sentencing factors other than the guidelines says the Court should consider those.

Id.

Then, the court considered those very factors, as it was bound to do. It considered the fact that Mr. Kimbrough had never before had a felony conviction, that he had served his country in Iraq "and honored his country and received an honorable discharge," and that since then he has been gainfully and meaningfully employed as a construction worker. J.A. 74.

Finally, the court noted "that the crack cocaine involved in this case does in fact exaggerate the advisory guideline" range such that imposing a Guideline sentence would be "greater than necessary" to accomplish the goals of the statute. J.A. 74. Accordingly, the judge imposed upon Mr. Kimbrough, a low-level cocaine offender with no previous felony conviction, a sentence of 180 months. J.A. 76.

It is hard to imagine a district court performing its sentencing role more clearly or dutifully than the district court here. Indeed, given all the facts of this case, and the realities of crack cocaine sentencing in general, it is hard to imagine a Guidelines sentence would have been appropriate or reasonable in this case. And, even if the case could be made that a Guidelines sentence would have been reasonable, the sentence actually imposed cannot be considered *unreasonable*. *See Booker*, 543 U.S. at 765. The district court's sentence was, at a minimum, well within its discretion following *Booker*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Dated: July 26, 2007

IN THE SUPREME COURT OF THE UNITED STATES

- x

DERRICK KIMBROUGH, :

Petitioner :

v. : No. 06-6330

UNITED STATES :

- x

Washington, D.C.

Tuesday, October 2, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

MICHAEL S. NACHMANOFF, ESQ., Federal Public Defender, E. District of Virginia Alexandria, Va.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-6330, Kimbrough versus United States.

Mr. Nachmanoff.

ORAL ARGUMENT OF MICHAEL NACHMANOFF

ON BEHALF OF THE PETITIONER

MR. NACHMANOFF: Mr. Chief Justice, and may it please the Court:

Derrick Kimbrough's case is about what a district court may consider when imposing sentence in conformity with Section 3553(a).

That statute directs sentencing courts to do exactly what Judge Jackson did in this case. He properly calculated and considered the advisory guideline range, the Sentencing Commission's reports, Mr. Kimbrough's personal history and background, and the offense itself, as directed by the statute. He then made case-specific findings to impose an appropriate sentence, and he did not make any categorical determinations.

The Fourth Circuit reversed, applying a per se rule prohibiting disagreement with the crack cocaine guideline. The government, on the other hand, argues that Congress has implicitly directed sentencing

courts to adhere to the crack guidelines.

Both of these positions are wrong.

With respect to the Fourth Circuit, the Fourth Circuit applied a rigid rule that prohibited any disagreement with the crack guideline, which is determined solely by drug type and quantity. They then prohibited the imposition of any sentence outside the guideline range, either above it or below it, unless the court identified facts specific to the defendant or the offense.

This ruling is inconsistent with the Court's holdings in Cunningham and Rita, which hold that the courts must be free to disagree with policies.

Finally, the Fourth Circuit required that those facts be atypical, which mirrors the exact language that was excised in 3553(b)(1).

JUSTICE KENNEDY: Could the Congress have mandated the result and the rationale that the Fourth Circuit used here?

MR. NACHMANOFF: Your Honor, Congress can certainly speak explicitly through its statutes to impose further refinements on the penalty structure that it set out in 841.

Section 841, on its face, does no more than set mandatory minimums and maximums at two triggering

quantities. If Congress wanted to specify further triggering quantities which would cabin the discretion of sentencing courts, they could do so, but they have not done so and there is no canon of statutory construction that the government identifies or that I'm aware of that would justify the notion of the implicit binding directive.

JUSTICE ALITO: If Congress made a finding that crack and cocaine are equally dangerous and passed a statute that said, for sentencing purposes, every district judge shall treat cases involving these two substances exactly the same, would there be a Sixth Amendment problem with that? Or do you think every district judge gets the right to make that policy decision individually?

MR. NACHMANOFF: Justice Alito, Congress certainly can cabin the discretion of judges. But once they set a floor and a ceiling, pursuant to this Court's remedial holding in Booker, judges must be free to consider the entire range of punishment. And Booker relies on the notion that the Guidelines are now fully advisory and, therefore, judges without having to identify specific facts have to have the discretion to disagree with policies or identify things unique to the case in order to fashion an appropriate punishment.

JUSTICE SOUTER: What's your answer simply to the very simple argument that because the floor was set on the assumption of a 100 to 1 ratio, set by Congress, that any other sentencing assumption, regardless of the particular justifications in a given case, is simply incoherent with the statutory scheme and for that reason should be regarded as unreasonable?

MR. NACHMANOFF: Yes, Your Honor.

JUSTICE SOUTER: It is the coherence problem that is bothering us.

MR. NACHMANOFF: Yes. There are several answers to that question, Justice Souter. The first is that this Court has recognized with the same statute which has the same structure that the government argues can only logically be understood one way, that with regard to the weight for LSD in the case of Neal versus United States, it is perfectly appropriate for there to be two different methods of calculating weight for purposes of punishment. The Guidelines calculate weight based on a presumed weight of the combination of the LSD and the blotter paper or the carrier medium. And the statute defines the method for calculating the mandatory minimum by the combined weight of the LSD and the blotter paper, regardless of whether it is heavy or whether it is light.

JUSTICE SOUTER: But is that an argument for saying, well, in the LSD case, you approved of incoherence and irrationality, therefore, you want to do it across the board? I mean, there is still an argument here on the merits regardless of Neal that there is an incoherence between the minimum and the kind of discretion that you're talking about.

MR. NACHMANOFF: Well, Your Honor, I think what Neal reflects is that there's no implicit binding policy directive in 841 itself that requires either the Commission or sentencing courts to follow in lock step on a graduated proportionate scheme, whatever it is that Congress decided with respect to two specific triggers should be the case.

JUSTICE SOUTER: Did we have the cliff problem in the LSD case?

MR. NACHMANOFF: Yes, Your Honor. The Court recognized that, in fact, cliffs are the inevitable results of mandatory minimums.

JUSTICE SOUTER: So we are in the same boat, then, you say with Neal in that respect, too?

MR. NACHMANOFF: Yes, and Your Honor, if I could also point out that there really is a myth here with regard to the 100 to 1 ratio as it stands now and as the Commission created it in 1987. The 100 to 1

ratio describes the relative weight of crack cocaine and powder cocaine with regard to the levels in the sentencing table; so that if you compare, for example, the 10-year mandatory minimum trigger, 50 grams of crack, that gets you to a level 32 in the sentencing table and it requires 5 kilos of powder cocaine or 5,000 grams. That's the 100 to 1 ratio.

And it is true that if one compares the low end of that table -- 5 kilos to 50 grams, you end up with the same punishment, or likewise, if you compare the top of the range, 15 kilos to a 150 grams.

But the way the guidelines have been written, there are a multitude of ratios that get applied right now and were applied in the pre-Booker guidelines scheme.

In other words, 14.9 kilos of powder compared to 51 grams of crack results in a 292 to 1 ratio. You get the exact same punishment, it is a level 32.

Likewise if you flip it, and you compare 149 grams of crack to 5 kilos of powder cocaine, you are still within a level 32, and it is a 34 to 1 ratio.

JUSTICE SCALIA: Maybe that was wrong. Maybe the Sentencing Commission should have, in order to be faithful to the Congressional determination, should

have done it quite proportionately. I mean, I'm not hung up on what the Sentencing Commission said. I'm hung up on what the courts should do now.

MR. NACHMANOFF: I agree, Justice Scalia. And of course, the Sentencing Commission taken to the ultimate extreme would have had to have a proportionate sentencing table by gram or fraction of a gram in order to preserve the 100 to 1 ratio, which simply points out in combination with Neal the fact that this was a choice made by the Commission, a choice, by the way, not grounded on any empirical evidence or any other reason other than what 841 originally indicated.

It could have been done differently. It is done differently with regard to other drugs in 841, such as LSD or such as marijuana plants, which have a different method for calculation under the Guidelines as they do for purposes of mandatory minimums. And, of course, what that means is that there is no implicit directive, which is the only rational --

JUSTICE SOUTER: That just goes back to Justice Scalia's point. There may very well be an implicit Congressional directive that the Commission did not follow.

MR. NACHMANOFF: Well -- Your Honor, Congress has a method --

JUSTICE SOUTER: It did not reject them, you are saying? So, therefore, in effect, there was a Congressional ratification?

MR. NACHMANOFF: Well, Congress did not reject the original table that was created by the Commission in 1987. That is correct. But Congress also did not at any time in Section 994, which is where it has given other explicit directions to the Commission to fashion guidelines in a particular way, say anything about how to fashion the punishment for crack cocaine or any of the other drugs in Section 841.

So Congress understands if it wants to give further guidance to the Commission how to do it.

JUSTICE GINSBURG: Mr. Nachmanoff, in the absence of anything further from Congress, and accepting your argument that there's no -- that the Guidelines did not have to adopt the ratio that is applicable to the mandatory minimum, could a district judge then say, I see that this disparity is untenable, but I think drugs are a very bad thing, so I'm going to sentence for powder as high as for crack?

MR. NACHMANOFF: Justice Ginsburg, our rule certainly contemplates the fact that there may be circumstances in which district judges may come to conclusions about the appropriate sentence, taking into

consideration the purposes of sentencing and the parsimony provision --

JUSTICE GINSBURG: But if we throw out the 100 to 1, what is the range open to the district judge -- hundred to one is okay, but I have to use the -- I'm going to use the crack for both? Or say there is a difference between the two, so I'm going to set it at 20 to 1 and another judge 5 to 1.

What is -- are all those reasonable within the position that you take in this case? Would all those have to pass muster at the court of appeals level?

MR. NACHMANOFF: Well those certainly are positions that judges could take. In this particular case, the judge was presented with information that led the court to conclude that reducing the sentence for crack based on the Commission's overwhelming empirical evidence and penological evidence and the statistical evidence that was submitted was relevant to the various factors in 3553(a), in particular the purposes of sentencing. And that the Guidelines would not be appropriate and, therefore, a lower sentence would be appropriate.

JUSTICE ALITO: What if the Fourth Circuit sees a number of absolutely identical cases exactly like Mr. Kimbrough's, and it is apparent in one, the

sentencing judge either explicitly or implicitly has used a 1 to 1, and the next one used 20 to 1, the next one has used 50 to 1, the next one has used 80 to 1, and the next one has used 100 to 1, what is it to do under reasonableness review?

MR. NACHMANOFF: The court of appeals has been given explicit instruction by this Court that it is to review all of those sentences under an abuse of discretion, which means that its job is not to substitute its judgment for the lower court.

And if those sentencing courts have articulated reasons and have relied on relevant and reliable --

JUSTICE ALITO: But the cases are absolutely identical. Everything is absolutely identical about them, except for the sentences. Can't introduce any new variables. What is the court of appeals to do?

This is not a hypothetical situation, really. This is what courts of appeals who have to see dozens of these cases have to do. There's a policy question there. How severely should crack be treated? What is the substantive review that the court of appeals is supposed to provide in that situation?

MR. NACHMANOFF: Justice Alito, sentencing courts now are free to consider the full range of

punishment and to consider the purposes of sentencing in both issue-specific to the defendant and the offense and also general policy issues. That is the clear holding of the Booker remedial opinion and reaffirmed in Cunningham and in Rita. When judges have that full discretion to consider the guidelines and follow the mandates of 3553(a), but then impose a sentence that meets the purposes of sentencing and is consistent with the parsimony provision, there may well be judges that come to different conclusions, as your hypothetical posits, about what people with similar or even identical records and identical circumstances may -- may do.

I would say that the reality is in the lower courts no two cases are alike, and so there are always reasons for judges to make reasoned distinctions in imposing sentences, even where, for example, the drug type and quantity is identical.

JUSTICE ALITO: Well, I take it your answer is that all or most of those cases would be affirmed under reasonableness -- under abuse of discretion review?

MR. NACHMANOFF: If -- yes.

JUSTICE SOUTER: If you were representing the one who got the 80 to 1 ratio you would file an amicus brief, no error in judgment?

MR. NACHMANOFF: Well, Justice Souter, if the court followed the procedural requirements of 3553(a), if the information was subjected to the adversarial process, and if the court imposed a sentence consistent with the parsimony clause, it would be hard to imagine a basis upon which to object.

JUSTICE BREYER: The basis is that that would be the end of the Guidelines. I mean, that -- every judge has his own view of policy and there is a vast range. No point having advice -- I mean, fine, but I don't think this Court said it, and I think that the test is supposed to be reasonableness, and I think 3553(a) does have a lot of instructions, and one of the major thrusts is follow the Guidelines. It doesn't make them mandatory. But they're in there.

All right, so the problem for me is just what Justice Alito was saying: Is there a path here between saying, well, judge, leaving everything special about your case out of it -- we're only talking about a judge who says there's nothing special about my case -- I disagree with the policy of the commission.

In such a case, is there a choice between saying that no matter what the commission says, the court of appeals must insist that their district judges follow in terms of a policy; and the opposite, which is

to say they don't have to do anything that the commission says, because the commission is always choosing among reasonable choices. Very rarely -- maybe you have one in this case -- but very rarely is it totally unreasonable.

How do we thread the channel?

MR. NACHMANOFF: Justice Breyer, the Booker remedial opinion makes it crystal-clear that to avoid the Sixth Amendment problem with the mandatory Guidelines, judges must be free to disagree with the Guidelines.

JUSTICE BREYER: To the extent that it's reasonable, and where we're talking about individual cases we've already said, given the history of our legal system, it's very reasonable to give lots of discretion to the district judge.

Now we're talking about what's reasonable in the context of 3553(a); and I don't think Booker says one way or the other on that, nor I do believe Rita says one way or the other.

MR. NACHMANOFF: Your Honor, 3553(a) is driven by the purposes of sentencing.

JUSTICE BREYER: Driven by a Congress that wrote guidelines; and at the last minute, in a separate matter that we've taken out and wasn't put in the

initial draft added the word "mandatory." So the history of 3553(a) is a history of a statute that is seeking uniformity through guidelines.

At least that's my view of it. And for purposes of the question, which is an important question to me, let's assume that.

MR. NACHMANOFF: Well, Your Honor, the appellate courts still have a role to play and that role is to ensure that the sentencing courts have followed the mandate of 3553(a), and that --

JUSTICE SCALIA: Indeed, it may be quite impossible to achieve uniformity through advisory guidelines, which is why Congress made them mandatory.

(Laughter.)

MR. NACHMANOFF: That very well may be, Justice Scalia. In -- this Court even in the remedial opinion in Booker recognized that uniformity as it was understood in the pre-Booker days would be reduced, and that there might be more sentences that have different results --

JUSTICE BREYER: In other words, I'm assuming now you have not -- you don't have a good answer to my question. You're saying either we have to make it unconstitutional, which I don't think they are, or you have to say anything goes, and that my question

has no answer in your view?

MR. NACHMANOFF: Well, Justice Breyer, your question certainly is a difficult one. Let me say this: With regard to uniformity, Congress has the power to make sentences more uniform. They can do it in a variety of ways and they have done it where they've thought it was important. They haven't done it with regard to the 100 to 1 ratio beyond the mandatory minimum or the statutory maximum.

JUSTICE SCALIA: And you don't say -- you don't say anything goes. I mean, the hypothetical that Justice Alito gave is -- is easy, only because Congress has created the 100 to 1 ratio as presumably reasonable. If Congress enacted it as a statute, it has to be reasonable.

So that enables you to say anything from 1 to 1 to 100 to 1 is reasonable. But your position is not anything goes. It's anything that's reasonable goes.

MR. NACHMANOFF: That is correct, Justice Scalia. And --

JUSTICE KENNEDY: And is "reasonable" defined as an appropriate interpretation of congressional intent, or does "reasonable" mean something else, like a just sentence? What -- how do we

define "reasonable"?

MR. NACHMANOFF: Well, Your Honor, I think that that --

JUSTICE KENNEDY: Whether or not the commission and then the district judge reasonably interpret the congressional intent, and if the commission reasonably interprets the congressional intent is the district court allowed to disregard that?

MR. NACHMANOFF: Sentencing courts must be able to disagree with the commission's conclusions about congressional intent.

JUSTICE KENNEDY: Assuming the commission was reasonable, can they still disagree?

MR. NACHMANOFF: Yes, Your Honor. I think that is the essence of the Booker remedial holding, that in order to cure the constitutional problem with mandatory guidelines, judges must be free to reject, must be free to reject those guidelines. And in fact Cunningham makes that clear, that in the California determinate sentencing area it was the inability of judges to impose a higher sentence based on the general objectives of sentencing, as opposed to particular factors or circumstances in aggravation, that made it unconstitutional. So whether the commission concluded that the congressional intent was to import the 100 to 1

ratio or not -- and clearly there is no statutory construction that can be inferred or understood from 841 by itself. It is not explicit and the government concedes that.

JUSTICE KENNEDY: So in your case you ask us to establish the proposition that in any case, a sentencing judge must always be free to disregard a reasonable interpretation of the Commission, a reasonable interpretation of a congressional statute?

JUSTICE STEVENS: May I interrupt before you answer. The question isn't whether they can justify a reasonable. It's whether they can justify not following one that creates unwarranted disparities within the meaning of the statute.

MR. NACHMANOFF: That's -- that's correct, Justice Stevens.

JUSTICE KENNEDY: You would go further -- you would go further and -- and submit to us the proposition that I -- that I just stated?

MR. NACHMANOFF: Well, Your Honor, if -- if I understood it correctly, the question is whether or not when the commission concludes this is what Congress intended --

JUSTICE KENNEDY: Reasonably.

MR. NACHMANOFF: -- reasonably -- does it

somehow imbue that particular guideline with some special binding nature. And my response would be that the Booker remedial opinion makes it clear that the Guidelines as a whole must be viewed as advisory. The government tries to argue that if some Guidelines are special and are binding, and others are advisory, there's no Sixth Amendment problem. But that ignores the fundamental principle of the Booker remedial hearing -- holding, which is that the Guidelines as a whole must be advisory and judges must be able to disagree with them. And of course here is perhaps the paradigmatic example of a time when the commission's original guidelines got it wrong, didn't further the purposes of sentencing; and, of course, they themselves have made that conclusion, and for sentencing purposes --

JUSTICE KENNEDY: But -- and I take it your submission is that the district court must be able to make the determination that the commission's policy is to be disregarded in every case to come before the court?

MR. NACHMANOFF: Well, Your Honor, 3553(a) requires individualized sentencing. There's no question that judges are required to follow in every case the mandates of 3553(a) and to calculate the advisory Guidelines correctly.

Now, there is no reason why judges cannot in a certain class of cases conclude that the Guideline gets it wrong; that it overstates the seriousness of the offense; that it creates an unwarranted disparity; and that they are going to impose a sentence outside of that guideline range.

That does not in any way remove the requirement that they subject every sentencing to the adversarial process to give the parties the opportunity to convince them that the guidelines should be followed, or not followed, or to be reconsidered.

JUSTICE GINSBURG: And Mr. Nachmanoff, I think that you are agreeing, although you don't want to come right out and say it, with Justice Scalia's point; that is, anything from a hundred to one down to one to one is open to the district judge; and within that range, there is no abuse of discretion.

MR. NACHMANOFF: Your Honor, I certainly agree that that full range is available to the sentencing court.

JUSTICE SCALIA: Only because Congress has said 100 to 1. That strikes me as utterly unreasonable. But if Congress has said it, it can't be unreasonable. That's what makes that an easy hypothetical, but that would not be the normal case, that a 100 to 1 disparity

wouldn't be -- would not be unreasonable.

MR. NACHMANOFF: Yes, Your Honor.

JUSTICE GINSBURG: In any case, your answer is anything from what Congress has said, down to one to one, would be a reasonable sentence that would be -- that would pass muster on appeal because it is not an abuse of discretion.

MR. NACHMANOFF: Well, if I can be clear, Justice Ginsburg, sentencing courts must have available to them the full range of punishment as defined by Congress. And that range, for purposes of 841, are broad ranges based on triggering quantities at 5 grams and 50 grams for crack cocaine. Within those ranges, as long as the court follows the requirements of 3553(a), considers all the purposes of sentencing, engages in an individualized sentencing process, and relies on relevant and reliable information, there would be no basis under abuse of discretion review to reverse the sentencing court in that instance.

JUSTICE GINSBURG: But you've given me a bunch of hand holds that, quite frankly, are quite easy for a district judge to say: Here's my laundry list; and I'm going to go through every one of them; but in the end I think the ratio should be 20 to 1; and that's what I'm going to impose.

MR. NACHMANOFF: Well, again, Your Honor, Congress certainly has the power to cabin that discretion. They just need to do it explicitly, and they have not done so.

JUSTICE GINSBURG: So -- Congress not having done that, then the range is open to the district judges, 100 to 1 to 1 to 1.

MR. NACHMANOFF: That's correct, Your Honor. If if may reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Nachmanoff. Mr. Dreeben?

ORAL ARGUMENT BY MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Mr. Chief Justice, and may it please the court:

The question in this case is essentially, can a district court reasonably disagree with the judgment of Congress concerning the ratio between the quantity-based sentences for crack and powder.

JUSTICE STEVENS: Mr. Dreeben, can I ask a question right at the outset that is critical for me. I think this case may well be controlled by the decision in Neal against the United States, which is not cited in the government brief and wasn't cited in the blue brief.

But there the Court held that a policy

judgment by Congress fixing mandatory minimums on the basis of the weight of the carrier rather than the drug did not justify guidelines based on that ratio -- based on the same principle -- if that would produce unwarranted disparities.

And, as I understand the facts of this case, the Commission has told us actually in some of its reports that the 100 to 1 ratio does produce unwarranted disparities. Therefore, we should disregard the entire guideline as we did in Neal, and the reason the Neal case is controlling in this case.

MR. DREEBEN: Justice Stevens, let me start with the Neal decision, because I think Neal is fundamentally unlike this case. In Neal this Court had to determine whether its prior construction of a statute, Section 841, survived the Commission's decision --

JUSTICE STEVENS: But that is a construction of what Congress intended, and for purposes of decision we assumed that Congress intended what we held the statute meant.

MR. DREEBEN: Justice Stevens, the only question presented in Neal was, did the Commission's weight guideline for LSD require this Court to change its interpretation of Section 841. And the Court held

no.

There was no question before the Court about whether the Sentencing Commission had legitimately adopted a different formula than the mixture or substance rule that this Court had held governed the statute.

The LSD guideline was not in play in Neal. The government never challenged it. Its rationality was not at issue. All the Court had to hold was that whatever the Sentencing Commission did --

JUSTICE STEVENS: It does hold that a guideline that does not conform with a congressional judgment merely expressed in a mandatory minimum is a guideline that would survive.

MR. DREEBEN: Well, I disagree with that, Justice Stevens, because no one challenged the guideline in Neal. There was nothing at issue in the Court to decide about whether that Guideline was valid. But even if the Court thought that Neal does involve some sort of a principle that the Sentencing Commission has greater freedom to vary from the procedures laid out in a mandatory minimum sentencing statute, Neal does not control this case, because there is more data about what Congress intended the ratio between crack and powder to be, and because Congress changed the basic, organic

statute that governs the Sentencing Commission's --

JUSTICE STEVENS: Yes, but there's also more data that the Commission has reflected on all this and still concludes that the 100 to 1 ratio creates an unwarranted disparity which is contrary to the statute.

MR. DREEBEN: Well, the statute, itself, Section 841, establishes the ratio of a 100 to 1. When the Commission first considered creating drug guidelines --

JUSTICE STEVENS: It establishes the ratio for mandatory minimum purposes only, is what Neal held.

MR. DREEBEN: Well I disagree with that, Justice Stevens, and I'm trying to explain why the legal context is different from the legal context in Neal.

Let me start with a couple of points about this. First of all, when the Commission promulgated the drug Guideline initially, it conformed it to the 100 to 1 ratio that existed under the mandatory minimum sentencing statute, because it recognized -- and these were the Commission's words -- that a logical and coherent sentencing scheme required that there be consistent proportionality throughout the sentencing process.

When the Commission later studied the crack-powder ratio and concluded that Congress had

gotten it wrong and, therefore, the Commission, itself, had gotten it wrong by conforming to what Congress did, it proposed a Guideline that would have changed the ratio for Guideline's purposes only to one to one between crack and powder.

And Congress, for the first time in the history of its review of Guidelines amendments, rejected that proposal; and it did so with legislation that made clear that it believed that if the commission wanted to come back with something new, it should propose something that would change both the Guidelines and the sentencing statutes so that they would continue to work in tandem -- that it would preserve a higher ratio of punishment for crack than powder because it believed that crack was more serious, and that it believed that any ratio should apply consistently across the Guidelines and the statute.

CHIEF JUSTICE ROBERTS: And if -- you're talking about Public Law 104-38?

MR. DREEBEN: That's correct.

CHIEF JUSTICE ROBERTS: Well, they also said, quote, "The sentence imposed for trafficking in crack cocaine should generally exceed the sentence for powder cocaine."

MR. DREEBEN: Correct.

CHIEF JUSTICE ROBERTS: Well, that's fine, but that's pretty far from 100 to 1. "Generally exceed," it suggests to me that Congress itself, in terms -- you are relying on this implicit directive from Congress. And that's the latest expression of congressional implicit direction, and it just says "generally exceed." So, you know, two to one.

MR. DREEBEN: This, Mr. Chief Justice, is what Congress instructed the Commission to consider in making recommendations to change the existing state of the law.

We don't dispute --

CHIEF JUSTICE ROBERTS: Well I know, but you are relying on an implicit directive anyway. So as you are looking at that vague direction, it seems to me that their last expression on what they wanted the Commission to do is more probative than a much older pre-existing 100 to 1 ratio.

MR. DREEBEN: But they have never changed the 100 to 1 ratio. And what I think is significant about this statute is what it continues to say, and this is on page 124-A of the government's brief -- that "the recommendations concerning an appropriate change to the ratio that the Commission might believe is warranted shall apply both to the relevant statutes and to the

Guidelines." This is on the carryover sentence on pages 24-A to 25-A.

And what I think that this reflects is Congress' recognition that, so long as the mandatory minimum statutes are pegged at 100 to 1, the Guidelines need to follow suit. Now if they're going to change, that's fine. But they should change in a manner that's consistent so as to avoid unwarranted disparities between defendants who are governed by the literal mandatory minimum statute and defendants who are not.

The alternative is you end up with various serious cliff effects which the Commission itself was trying to avoid, where a defendant who has 50 grams of crack is sentenced to a minimum of 10 years. But if you drop the ratio to one to one, a defendant who has 49.9 grams --

JUSTICE STEVENS: But those are the same cliff effects that are the product of Neal, precisely the same.

MR. DREEBEN: But this Court didn't consider whether those cliff effects were legally valid in Neal because it had no guideline before it. And I did went to get to the other point that I think distinguishes the legal context in Neal from the legal context today, and that is, in 2003, Congress amended the organic statute

that governs the Sentencing Commission's promulgation of Guidelines to require that the commission make AUDIO STARTS its Guidelines consistent with all pertinent provisions of the United States Code.

At the time of Neal, that statute only required the commission to be consistent with Title 18 and Title 28, and the drug statute is found in Title 21. And the legislative evolution of this provision reflects that there was concern that the commission did not have to honor --

JUSTICE STEVENS: In response to that statute, did the commission revise the guideline that was involved in Neal?

MR. DREEBEN: It did not, and the government --

JUSTICE STEVENS: Shouldn't it have done it?

MR. DREEBEN: I think it should have, and I think that the commission's decoupling of its guidelines from the mandatory minimums that Congress has provided produces an irrational disconnect between guideline sentencing and sentencing --

JUSTICE BREYER: Well, that's because of the cliff. But the cliff is undoubledly a negative, but the cliff is not as important as sometimes suggested, for the numbers after all, which relate punishment to

amounts of drug, reflect, (a), more seriousness than what you have -- I mean more people likely to take it -- but also the role that the person is likely to play in the organization, high or low, and the likelihood that he is or this -- these groups of people are big deal offenders or not, and many other things.

Therefore, a system that really is basically flat or only rises slowly until you get to the cliff, and then it again rises slowly to the next rise, is not an irrational system. It depends on what those other correlations are. I say that because suppose a judge, noticing the horrendous effects of this -- that the commission itself has listed and understanding that cliffs are not the end-all and the be-all of Guidelines that are rough correlations, suppose a judge said: My system, which we have before us, which doesn't have the absolute numerical progression, is far more reasonable than the commission's system. There it is. He's reviewed the commission's policy.

Well, Rita says sometimes courts could. And so what is the law that forbids the judge from doing that, at least on occasion?

MR. DREEBEN: Justice Breyer, as a general matter, the government accepts that a sentencing judge can revisit, challenge the Sentencing Commission's

policy determinations as an intrinsic feature of an advisory guideline system. It's not because we welcome that result, but because we think that it followed from this Court's decision in Cunningham and that was expressly stated in Rita.

But this is not an area where the sentencing courts would be merely second-guessing a commission judgment. They would be second-guessing a judgment of Congress itself.

JUSTICE BREYER: No, because Congress has nowhere said that you can't have cliffs.

You see, Congress could say, our rough judgment is that 5 Gs of hard -- of crack really is kind of a correlation with a medium-level gang, and 50 Gs is probably a correlation with a fairly high-level gang. And what has Congress actually thought about this? Nothing. They never thought about it.

So I can't find an instruction there that tells the commission that they can't do it this way.

MR. DREEBEN: But, Justice Breyer, the one time when the commission tried to do that --

JUSTICE BREYER: They wanted to abolish the whole thing.

MR. DREEBEN: They wanted to make it one to one, and Congress recognized that that would produce

severe cliffs and said not appropriate; if you want to change the sentencing statutes and guidelines in tandem, that's fine, make a recommendation. And so the government's fundamental position here is that Congress has made a judgment that until it says otherwise, sentencing ratios of 100 to 1 are appropriate to reflect the increased harms of crack.

JUSTICE SOUTER: Isn't your answer also to Justice Breyer's question the post-Neal amendment to the statute which in effect says, you know, make your Guidelines consistent with the statute?

MR. DREEBEN: Yes, it --

JUSTICE SOUTER: Quite -- quite apart from the specific rejection of the proposal they came up with.

MR. DREEBEN: The two of them work together in tandem, I think.

JUSTICE BREYER: Why? Why? That's my question. Everyone's assuming that "consistent with the statute" means a sentencing system that's smooth without cliffs. And I'm sure every mathematician would agree with you, but I'm not at all certain that prosecutors and defendants who have actual experience in this would agree with you, because there are lots of arguments that it's perfectly consistent with the objective of the stat

tute to have a few cliffs.

MR. DREEBEN: Well, I think I want to rely on what the Sentencing Commission itself did before it concluded that it disagreed with the 100 to 1 ratio in the statute. And this is set forward -- forth at page 50A of the same brief, the Kimbrough brief. This was the commission's original commentary where it explained, in the first full paragraph, how it set the basic levels for drug crimes. And it said that it set them because they were either provided directly by Section 841 of Title 21 or, quote, "are proportional to the levels established by statute," and it said, further refinement of the drug amounts beyond those mandatory minimums was essential to provide a logical sentencing structure for drug offenses. And I think what the commission --

JUSTICE SCALIA: Well, that's why -- and the 1993 statute that you said, that you referred to, did indeed require the guidelines to track the -- the statutory prescriptions for sentencing.

MR. DREEBEN: 2003, I believe.

JUSTICE SCALIA: Pardon me?

MR. DREEBEN: It's 2003.

JUSTICE SCALIA: 2003. Sorry. I misspoke.

But -- but the fact remains that the Guidelines are only guidelines and that still doesn't--

doesn't convert to an obligation for the district courts to follow that scheme so long as that scheme is only reflected in the guidelines. The guidelines themselves are still just advisory.

MR. DREEBEN: What distinguishes this area, Justice Scalia, I believe, from other guidelines is that the backdrop for sentencing for drug crimes is a mandatory minimum statute that goes directly to the sentencing court. It's not subject to the commission's intervention and it's not subject to a district court's power to disagree with. The sentencing court must use a 100 to 1 ratio in applying the mandatory minimums.

JUSTICE SCALIA: Well, why don't you just skip the Guidelines and say that the effect of the sentencing statute is to make it unreasonable for a sentencing judge -- never mind the Guidelines -- to do anything other than follow the 100 to 1 prescription that Congress has established?

MR. DREEBEN: Well, I'm happy to do just --

JUSTICE SCALIA: I don't know what the Guidelines add to -- to your game except another -- another stage.

MR. DREEBEN: Well, if -- if it's sufficient for the Court that Section 841 itself establishes the 100 to 1 ratio and that's something that's off-limits

for the district courts to disagree with, I'm content.

I think there is additional data that indicates that Congress vetoed attempts by the Sentencing Commission to vary from that range and made it clear that the Guidelines formulations and the statute worked in tandem, which together expresses a notion of quantity proportionality tied to the 100 to 1 ratio.

JUSTICE SCALIA: Well, I would say that that statute reflects Congress's desire that sentencing, whether it's through the commission or not, be based on the 100 to 1 ratio.

MR. DREEBEN: And I agree with that, Justice Scalia. And the upshot of disagreeing with that, which is what various district courts have done but no court of appeals has endorsed, is that every district court could come up with its own ratio and that that ratio would have to be accepted as reasonable so long as there is a cogent, logical data support for it. And here --

JUSTICE STEVENS: But is it not true that that only affects about 20 percent of the crack cocaine cases, because they say -- maybe I'm wrong on this -- that 80 percent of the sentences are actually fixed by the mandatory minimum?

MR. DREEBEN: There's a floor in the

mandatory minimum, but I think that there are quite a few sentences that are above the mandatory minimum and there are sentences that are below the mandatory minimum. And in those cases --

JUSTICE STEVENS: I was -- and correct me if I'm wrong. I was under the impression that 80 percent of the sentences that are actually imposed are at the mandatory minimum.

MR. DREEBEN: I didn't get that out of my attempt to plumb the data, Justice Stevens. The Sentencing Commission's most recent report has a chart that didn't, to my mind, break down adequately the figures so I could answer your question.

But I do think that, even if it's true, even if 80 percent were at the mandatory minimum, that would mean that as to those 20 percent that are not governed by a mandatory minimum, you could have one district judge say, I'm going to use one to one, like the commission proposed in 1995. Another could say I'm going to use five to one, like the commission proposed in 1997. A third could use 20 to 1, as the commission proposed in 2002. And each one of those would have a reasonable --

JUSTICE STEVENS: Isn't this another alternative? If the district judge concluded, as some

scholars have, that the 100 to 1 ratio itself creates unwarranted disparities, could not a district judge sentence by just disregarding the guideline for this particular substance? And then use just ordinary principles, what's appropriate sentencing in this case.

MR. DREEBEN: I don't think so, because I think here we're talking about a matter of statutory construction. Because the courts of appeals are reviewing sentences for reasonableness.

JUSTICE STEVENS: You have a conflict in the statute. One says await the guideline. Another says avoid unwarranted disparities.

MR. DREEBEN: That wasn't the two statutes I was thinking of. What I was thinking of is that Congress itself has said a 100 to 1 disparity --

CHIEF JUSTICE ROBERTS: No, Mr. Dreeben, your office used to argue that when Congress wants to do something, there's a way to do it. They pass a law through both houses, then the President signs it. That's the only way they can give legal effect to their intent.

Now you are arguing that there's some binding intent simply because they set mandatory minimums and mandatory maximums that carry beyond that. I'm wondering how that's consistent with the positions

the office has taken before.

MR. DREEBEN: Our position here, I think, is consistent with our view that you read statutes both for what they say and for what they mean. And here we are not relying just on Section 841, although I'm certainly happy if members of the Court believe that 841 alone dictates a proportionality rule, I'm also relying on the fact that Congress vetoed the Commission's attempt to break apart the Guidelines in the sentencing --

CHIEF JUSTICE ROBERTS: We should read a negative pregnant in the Congress' vetoing of what the Commission wanted to do?

MR. DREEBEN: At least the Court should do this much, that when a court of appeals is reviewing for reasonableness a sentence imposed by a district judge, the court of appeals should refract the Section 3553(a) factors through Congress' existing judgment that a 100 to 1 ratio is warranted.

JUSTICE BREYER: If Congress passes a statute that says the mandatory minimum sentence of eight years for possessing a 12-inch shotgun unlawfully, does that mean it wants four years for a 6-inch shotgun?

(Laughter.)

MR. DREEBEN: It doesn't. But, Justice Breyer, that's, for two different reasons, not an apt

analogy for this. First of all, Congress applied the 100 to 1 ratio at two different points in the sentencing spectrum.

Then if there was a rational basis for viewing shotgun culpability as turning on the length of the barrel, then perhaps there would be a better analogy. But I think here what Congress was focused on was the relative culpability of crack offenders and powder offenders.

JUSTICE BREYER: At the cliff. But, of course, I've been through -- I hope not being hypnotized by numbers myself -- that these numbers reflect underlying realities that are far closer to the shotgun case than you are prepared to admit.

MR. DREEBEN: No, but I think that Congress doesn't view the Guidelines quantity determinations as being independent from its mandatory minimum determinations. And that's why it vetoed the Commission's unilateral attempt to impose a one to one ratio --

JUSTICE GINSBURG: And then are you saying that either the guidelines are out of it and the statute controls, the ratio is a 100 to 1, or that Congress has, in effect, made a particular guideline, the one setting the drug quantity, made that mandatory? That

guideline -- I mean, it sounds to me that if you must adhere to the 100 to 1, then that's a mandatory guideline.

MR. DREEBEN: They do come down to the same thing, Justice Ginsburg, in the sense that the guideline as it exists today incorporates the 100 to 1 ratio. And I believe that Congress well understood that it was preserving a guideline that maintains fidelity and consistency with its sentencing statute while sending the Commission back to the drawing board and saying if we're going to change this scheme, let's change it in a consistent coherent way. And every district court does not get the power to say we're going to change what Congress has prohibited the Commission from changing, even though we can't change the mandatory minimum statute.

That is Congress' sentencing policy. We have to impose that in cases at the mandatory minimum. But in cases that aren't at the mandatory minimum, the position of the petitioner is basically district judges can say to Congress, you're completely wrong. And our position is that under a sympathetic attempt to construct reasonableness review that is consistent with Congressional intent, a district court can't do that.

CHIEF JUSTICE ROBERTS: Why doesn't

Congress -- why didn't Congress, in fact, do what you say they implicitly did explicitly? They could impose the 100 to 1 ratio throughout as opposed to simply as a minimum and a maximum. And they did not do that.

MR. DREEBEN: Because they had no reason to do it. Until this Court decided Booker, the Guidelines were mandatory. And they fully understood by leaving in place a crack guideline that mirrored the statutory --

JUSTICE SOUTER: Congress has legislated in this area after Booker. They have not imposed the 100 to 1 ratio throughout the -- other than as a mandatory minimum and maximum.

MR. DREEBEN: I'm not aware that they have legislated in this area after Booker, Mr. Chief Justice. And I think that since all the court of appeals have agreed with the single position that district courts are not free to substitute their own ratios for the 100 to 1 ratio, Congress would not have had a great deal of reason to intervene in this area.

And what this case will tell Congress and sentencing courts is within an advisory guidelines regime, can Congress make certain policy judgments and place certain limits on what a district court can do that it otherwise would have freedom to do in an advisory range.

JUSTICE SOUTER: But that, as you say, in effect, makes a certain element mandatory. And why doesn't that come up against the same Sixth Amendment judgement that we made in Booker?

MR. DREEBEN: The only requirement, I believe, that exists under Booker is that judge not in all cases be required to find a fact in order to exceed the guidelines range that would be based on the jury verdict alone or the admission of guilt alone.

Booker did not say that Congress had to tolerate every single policy judgment that individual district courts might make to vary upward. For example, socioeconomic status. If a particular judge felt in my courtroom college students and white collar professionals deserve an automatic bump up in their sentences above what I would give anyone else because they betrayed the advantages that they have, I think Congress could come along and say that's not right. We don't want socioeconomic status to be a variable that affects how long someone goes to prison.

JUSTICE SCALIA: It seems to me that the gap in your argument is that whatever Congress legislated, it did not legislate the manner in which you transferred this 100 to 1 ratio onto the sentencing chart.

And as your opponent points out, it isn't

done proportionally. It could have been done in a lot of different ways.

MR. DREEBEN: It is done in a logically proportional manner --

JUSTICE SCALIA: Maybe. But there are other logically proportional manners of doing it. Why would the district court be bound to the particular one that the Sentencing Commission chose?

MR. DREEBEN: The Sentencing Commission at least started where Congress did.

JUSTICE SCALIA: That's fine. I'm granting that they got a start where Congress did. I'm assuming that. But why do they have to follow it through the way the Sentencing Guidelines did?

MR. DREEBEN: I don't think they do have to follow it through exactly the way the Sentencing Commission did it, because they don't -- sentencing courts today which are sentencing under advisory guidelines need not use exactly the same base offense levels when they come down to final sentences after they've considered what the Commission has done. But what they cannot do, I submit -- and it is more of a negative -- they cannot say fundamentally the Commission has pointed this out and Congress has enacted, but the crack and powder guidelines are way out of whack. I

think that they're wrong.

I think Congress was wrong. And I'm going to do everything I can to try to eliminate that degree of disparity. And I may not be able to do everything I want to. This judge here was limited by the 120 months that was the mandatory minimum. But essentially, he, as I read the sentencing transcript, thought it was crazy for Congress to treat crack and powder differently. For a judge to say Congress is crazy, I think, is a sort of textbook example of an unreasonable sentencing factor.

The ultimate sentence will turn on how the judge applies all of the facts of the case to the particular --

JUSTICE STEVENS: Is it not a fact that this guideline is also unique in that it was not based on a history of other similar crimes like all the other -- most of the guidelines were? There's no expert interpretation of the history of sentencing in this particular area?

MR. DREEBEN: True. But this is an area where I don't think Congress chose to rely on the administrative expertise of the commission. It made its own policy judgment on crack.

JUSTICE STEVENS: I understand. This guideline is pretty much unique in that regard. It is

not based on experience in sentencing in comparable cases.

MR. DREEBEN: Well, the drug guideline was based on --

JUSTICE STEVENS: The 100 to 1 ratio is not based on history?

MR. DREEBEN: No. But entire drug --

JUSTICE STEVENS: Therefore, none of the sentencing guidelines relating to crack are based on history.

MR. DREEBEN: They are based on the fact that Congress made a supervening policy judgment. And in our system, the policy judgments ultimately pertaining to sentencing belong to Congress.

JUSTICE STEVENS: So there is really an entirely different rationale for defending these guidelines than any other guidelines in the system?

MR. DREEBEN: Well, there are some other guidelines where Congress has directly intervened, but my fundamental point here is that so long as Congress has made a determination that it has not changed, that it wants 100 to 1 as a mandatory minimum set point, district courts should not be free to say I think Congress got it wrong, I'm going to sentence on a different paradigm. The Commission didn't think that

was appropriate when it promulgated the original drug guideline, which is why that guideline is not based on the same sorts of empirical data that other guidelines might be deemed to be responsive to. But that only reflected that the Commission in its original guideline respected that its role was to carry out congressional policy, not to disagree with or supplant congressional policy, and so long as the Commission was operating in that vein -- which I think was correct -- it follows a fortiori that sentencing courts should do the same thing.

JUSTICE KENNEDY: Does the Guidelines supersede the parsimony provision, because the parsimony provision is general and the Guidelines -- the ratio is specific?

MR. DREEBEN: Well, I would put it differently, Justice Kennedy. I would say that Congress has made a legislative judgment that for crack purposes, this ratio is what is needed to have a sufficient sentence, and the Congress that decided that might be wrong. And if the present-day Congress decides to change that, a new policy will be established, but I think that reading the two statutes together, Section 3553(a) and Section 841, produces the conclusion that this is a legislative judgment of reasonableness; and

even if every judge in the Federal system holds a different personal view, that doesn't mean that the statute has validated their position over the one that Congress expressed in Title 21, in a manner that binds sentencing courts irrespective of how the Commission sorts out its policy judgments.

JUSTICE KENNEDY: Suppose experience shows that the ratio is not consistent with the parsimony provision -- we find that over a course of time?

MR. DREEBEN: Well, I don't think that the Court can interpret Congress in Section 3553(a) to make unreasonable what Congress did in Section 841. I think reading all of the statutes together would produce the conclusion that Congress deemed that this was the way to achieve the purposes of sentencing.

Crack is more corrosive in the inner cities. It has different kinds of problems than powder. They should be addressed in this more severe sentencing manner, and if that's a policy judgment that warrants being revisited, the appropriate body to do it is Congress, not each individual sentencing judge, formulating his or her own ratio, subject to blanket affirmance by the court of appeals.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Dreeben.

Mr. Nachmanoff, you have three minutes remaining.

REBUTTAL ARGUMENT BY MICHAEL S. NACHMANOFF
ON BEHALF OF PETITIONER

MR. NACHMANOFF: Thank you, Mr. Chief Justice.

If I can respond, Justice Stevens, I think -- you asked about the percentage of cases in crack that are at the mandatory minimum or near it. I would point the Court to page 33, footnote 10 of our opening brief. It is approximately 70 percent or just over that that hit at the mandatory minimum or just one or two levels above that.

So the large majority of cases involving crack cocaine end up being subjected to the mandatory minimum.

With regard to the Government's argument regarding Section 994(a) and the fact that direction was given to the Commission to be consistent with pertinent statutes, of course, that's reflected in Section 5(g) which says that mandatory minimums trump the Guidelines, and the Commission recognizes that and of course sentencing judges recognize that, and Judge Jackson recognized it here.

To suggest that Judge Jackson concluded that Congress was crazy, I think is unfair. What Judge Jackson did was, in a very reasoned opinion, explained that the information from the Sentencing Commission, which has been persuasive not just to Judge Jackson, but to judges across the country and to many others, was that the 100 to 1 ratio overstates the seriousness of the offense, and he understood that Congress had spoken clearly with regard to mandatory minimums, and he honored them.

Finally, Mr. Chief Justice, you point out the heart of the problem with the Government's case. Congress has not spoken explicitly in the way the Government suggests. They are --

CHIEF JUSTICE ROBERTS: But I was wrong that they legislated after Booker.

MR. NACHMANOFF: Well, Your Honor, Congress has failed completely to address this particular problem, and they have understood since Booker that if they wanted to address the issue of the discretion that sentencing courts must have with regard to the advisory guidelines, they have a way of fixing the problem. They can change the statute. And so long as they then require the Government to include in the indictment and prove to the jury beyond a reasonable doubt the specific

drug type and drug quantity over and above the current mandatory minimum and maximums, they're free to do that, and there would no Sixth Amendment problem and there would no problem with the advisory guidelines.

In other words, right now, the Government simply alleges that a person engaged in the distribution of either 5 grams or 50 grams of crack cocaine -- that's what they have to do to meet the thresholds for the 5-year and the 10-year mandatory minimums -- in virtually every case the Government will present evidence or a court will find under relevant conduct that there was some greater quantity. And if the Government's theory were to be accepted, those guidelines would be mandatory, and it would be in direct conflict with the remedial holding in Booker to require courts to adhere to that, absent the procedural protections which are not currently in place.

Judge Jackson did it right in this case. He imposed a sentence consistent with the parsimony provision and the purposes of sentencing and all of the factors in 3553(a).

He imposed a long sentence, 15 years, but he honored Congress's explicit mandate, and we would ask the Court to reverse the court of appeals and affirm the district court.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Nachmanoff. The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)

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